TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 32

JOHN MICHEL, PETITIONER,

vs.

STATE OF LOUISIANA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

PETITION FOR CERTIORARI FILED SEPTEMBER 29, 1954

CERTIORARI GRANTED FEBRUARY 7, 1955

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IN THE CRIMINAL DISTRICT COURT FOR THE PARISH OF ORLEANS, STATE OF LOUISIANA

Section "A"

MINUTE ENTRY—IMPANELLING OF GRAND JURY—September 2, 1952

Present, the Honorable William J. O'Hara, Judge of the said Court.

"The following named persons constituting a part of the venire of seventy-five names drawn from the jury wheel in conformity to law by the Board of Jury Commissioners for the Parish of Orleans, returnable before Section "A" of this Court on this Tuesday September 2nd., 1952 at 10:30 O'clock A.M., to serve as Grand Jurors in Section "A" of this Court, during the regular September, 1952, to March, 1953, term of this Court, and found qualified, were selected by the Court as follows:

1. Roy Louis Alciatore
2. Otto Henry Armbruster
3. Russell Leonard Cuoco
4. John Milton deBen
5. Joseph Linsler Fournier
6. Louis Robert Hanemann
7. Charles Graham Justice, Jr.
8. Noel August Parmentel
9. Charles Steptoe Potter
10. George Jos. Roussel, Jr.
11. John B. Shober
12. Victor Willard Viosca

From the above named persons so selected, the Court appointed John Milton deBen, foreman of said Grand Jury.

The Grand Jurors were then regularly impaneled and sworn, in open Court, to inquire in and for the body of the Parish of Orleans, for the period of six months unless sooner discharged by the Court.

The aforesaid Grand Jury having been charged by the Honorable William J. O'Hara, Judge, presiding in Section "A" of this Court, were ordered retired to their room in care of the Criminal Sheriff for the Parish of Orleans, and after organizing, was discharged by the Court, subject to call. The Court ordered a signed copy
2 of the Court's charge to the Grand Jury, filed with the Clerk of the Criminal District Court for the Parish of Orleans.

In compliance with Revised Statute 16:8, The Honorable Severn T. Darden, District Attorney for the Parish of Orleans presented to the Court the following report to the Grand Jury, setting out in detail, the existing status or disposition made of Indictments brought in by the two preceding Grand Juries. The report was received by the Court ordered filed and made a part of the minutes of this Court, this day. After receiving permission of the Court, Mr. Darden presented to each of the aforesaid Grand Jurors, in open Court, a signed copy of the aforesaid report."

(Stapled onto the minute sheet of September 2nd, 1952, is a copy of the nine page report as referred to in the minute entry and following said minute entry)

Extract from the Minutes of this Court.
Clerk's Office, March 16th 1953.

(signed) A. B. HUMPHREY, *Minute Clerk.*

Filed March 23, '53. (signed) W. J. HAMMER, *Minute Clerk.*

IN THE CRIMINAL DISTRICT COURT FOR THE PARISH OF ORLEANS, SECTION "A"

MINUTE ENTRY—DISCHARGE OF GRAND JURY—March 2, 1953

Present, the Honorable William J. O'Hara, Judge of the said Court.

"The Grand Jurors of the State of Louisiana, Parish of Orleans, duly impaneled and sworn to inquire in and for the body of the Parish of Orleans, this day through their Foreman, J. Milton deBen, presented to the Court their final report, which was received by the Court, ordered filed and made a part of the minutes of the
3 Court.

(Stapled onto the Minute sheet of March 2nd, 1953, is a copy of the final report, referred to above.) Thereupon, the Court thanked each of the Grand Jurors for their services rendered this Court, and discharged them without day. Eleven members were present and one (Mr. Russel L. Cuoco) was absent."

Extract from the Minutes of the Court.
Clerk's Office, March 16, 1953.

(signed) A. B. HUMPHREY, *Minute Clerk.*

Filed March 23, '53. (signed) J. HAMMER, *Minute Clerk.*

4 MINUTE ENTRY OF FEBRUARY 19, 1953

Indictment for violation of R. S. 14:42

A true bill. (Signed) J. MILTON DEBEN, *Foreman of Grand Jury.*

Returned into open court and recorded and filed February 19th, 1953. (Signed) A. B. HUMPHREY, *Minute Clerk.*

The court ordered the above indictments recorded and filed, a capias issued for defendant Sidney Reyes, with bail fixed in the sum of one thousand dollars and an alias capias without bail issued for each of the defendants, Roy A. Curtis, O'Neil Williams, Ethel Hallen, Andrew Wilson and John Michel.

MINUTE ENTRY OF FEBRUARY 23, 1953

Indictment for violating R. S. 14:42.

On motion of the defendant, the court granted the defendant until Monday March 2nd, 1953, in which to employ counsel. This arraignment continued to said date and the defendant, remanded.

MINUTE ENTRY OF MARCH 2, 1953

Indictment for violating R. S. 14:42

The court appointed G. Schreiber, Esq., to represent the defendant in this matter. On motion of the defense the court ordered this arraignment continued to Monday March 9th., 1953 and the defendant remanded.

5 MINUTE ENTRY OF MARCH 9, 1953

Indictment for violating R. S. 14:42

The defendant through his counsels, G. Fust Esq., and G. Schreiber Esq., did this day file with the court a motion to quash. The court ordered this matter specially fixed for hearing on March 23rd., 1953. On joint motion of the State and the defense, the court ordered that this case be specially fixed for trial on May 25th., 1953 and the defendant remanded.

MINUTE ENTRY OF MARCH 23, 1953

Indictment for violating R. S. 14:42

The defendant accompanied by his counsels, G. Fust esq., and G. Schreiber Esq., was placed at the bar of the court. A motion to Quash having previously been filed by the defense, the State this day filed written answer along with demurrer, to said motion to Quash. The State further filed in support of said answer, Extract of the Minutes of Sec. "A", for Sept. 2, 1952 and March 2, 1953. The court granted the defendant until Monday March 30th., 1953, in which to answer the State's Demurrer. The defendant was then remanded.

MINUTE ENTRY OF MARCH 30, 1953

Indictment for violating R. S. 14:42.

The defendant accompanied by his counsels, G. Fust Esq., and G. Schreiber Esq., was placed at the bar of the court. The defense, did this day file with the court, written answer, to the State's Demurrer, said Demurrer, having previously been filed by the State on March 23, 1953, in answer to the defendant's motion
6 to Quash, filed on March 9, 1953. In support of the defense's answer to the State's Demurrer, G. Schreiber Esq., and G.

Fust, Esq., were duly sworn by the clerk, testified on the part of the defense and were cross-examined on behalf of the State. In connection with the testimony of Mr. Schreiber, the defense offered in evidence, the following numbered and entitled records of the criminal District Court, to-wit: No. 138-324, State Vs. Alfred Dowel; No. 136991, State Vs. Robert Green, Jr., and No. 121-241, State Vs. John Michel. No objection by the State. The State argued. The defense argued. The matter was then submitted by both sides, whereupon, the court took this matter under advisement until Wednesday April 8, 1953. The court informed both sides that it (the court) would render a decision upon said date. The court further instructed the State and the defense to submit any law that they might so desire, by way of Briefs before the date set by the court for rendering a decision in this matter. The defendant was then remanded.

Minute Entry of April 8, 1953

Indictment for violating R. S. 14:42

The defendant accompanied by his counsels, G. J. Schreiber and Geo. Fust, was placed at the bar of the court. On March 30th., 1953, the court took under advisement, motion to quash, filed by defense and Answer and Demurrer filed by the State. The court did this day Sustain the Demurrer, filed by the State and further the court Dismissed the motion to Quash, filed by the defense.

7 To which ruling of the court counsels for the defendant, objected and reserved a bill of exceptions. Counsels for the defendant, herewith, motioned, orally, to submit evidence in support of the Motion to Quash, which motion was denied by the court, to which ruling of the court counsels for the defendant, objected and reserved a bill of exceptions. On motion of counsels for the defendant, the court granted the defendant, to Wednesday April 22nd., 1953, to file any further special pleadings. The defendant was then, remanded.

Minute Entry of April 22, 1953

Indictment for violating R. S. 14:42

The defendant accompanied by his counsels, G. Fust Esq., and G. Schreiber Esq., was placed at the bar of the court. Counsels for the defendant, this day filed with the court a motion to perpetuate Testimony, said motion was Denied by the court, to which ruling of the court counsels for the defendant, objected, and reserved a bill of exceptions. Counsels for the defendant then filed with the court a motion for a bill of particulars, the court granted said motion and ordered the State to furnish the particulars asked for by the defendant in his motion on or before April 27,

1953. Counsels for the defendant further filed with the court a Prayer for Oyer, whereupon the court ordered the State to show cause on April 27th, 1953 at 10:30 o'clock A.M. why the relief prayed for in defendant's Prayer for Oyer, should not be granted. The court then ordered the defendant remanded to April 27th, 1953.

8 MINUTE ENTRY OF APRIL 27th, 1953.

Indictment for violating R.S. 14:42

The defendant accompanied by his counsels, G. Fust, Esq., and G. Schreiber Esq., was placed at the bar of the court. The State this day filed written answer to defendant's motion for a bill of particulars, said answer was deemed sufficient by the defense, whereupon, the court ruled accordingly. The State did this day further file with the court written answer to defendant's Prayer for Oyer. The court ruled the State's answer to be sufficient in law, to which ruling of the court counsels for the defendant, objected and reserved a bill of exceptions. On motion of the defense, the court granted the defendant until April 29, 1953 in which to file further special pleadings, the defendant was then remanded.

MINUTE ENTRY OF APRIL 29, 1953

The defendant accompanied by his counsels, G. Fust Esq., and G. Schreiber Esq., was placed at the bar of the court. Counsels for the defendant did this day file with the court a motion for Supplemental Bill of Particulars, whereupon, the court issued the following order: "It is ordered by the court, that a hearing on the aforesaid motion be held on the 4th day of May, 1953 at 10:30 o'clock A. M., and that the Honorable Severn T. Darden, District Attorney for the Parish of Orleans, be and he is hereby ordered to show cause at the said time and place why the particulars asked for in the aforesaid motion should not be granted.

(Signed) NEILS F. HERTZ, *Judge*.

New Orleans, La., April 29th, 1953.

9 MINUTE ENTRY OF MAY 4, 1953

Indictment for violating R. S. 14:42

The defendant accompanied by his counsels G. Fust Esq. and G. Schreiber, Esq., was placed at the bar of the court. The court ruled that the answer filed by the State on April 30, 1953 to defendant's Supplemental motion for a bill of particulars, was sufficient in law to which ruling of the court counsels for the defendant, objected and reserved a bill of exceptions. The defendant was then arraigned (the clerk read the indictment to the defendant) and pleaded Not

Guilty. By agreement State and defense, this case specially fixed for trial on May 25th., 1953. The defendant was then remanded.

MINUTE ENTRY OF MAY 25, 1953

Indictment for violating R. S. 14:42

The defendant accompanied by his counsels G. Fust Esq., and G. Schreiber Esq., was placed at the bar of the court for trial. The State was represented by, Assistant District Attorneys, George Gulotta, Esq., and Peter J. Compagno Esq., The State and the defense being ready for trial, the following named jurors, to-wit: Thomas C. Blythe, Robt. E. Deck, Wm. E. Fitzmaurice, Lawrence V. Logan, Douglas O'Reilly, Jules F. Peytral, Joseph M. Squeier, were regularly accepted, duly sworn and empanelled to serve as jurors in this case. The jury panel of this court (Sec. "F") having been exhausted at this point, the court ordered that the names of the jurors of the jury panel of Sec. "D" of this court be put in the jury box. The following named jurors from the panel of Sec. "D", to wit: Frank H. Culotta, Wilfred J. Drez, Ellis E. Fortinberry, Raymond Frischhertz and Edgar Louis Stine, were regularly accepted, duly sworn and empanelled to serve as jurors in this case.

The defense used, 12 challenges. The State, 8 challenges. 14 jurors, were excused for cause, and 8, jurors were excused by consent. The hour being 8:45 P. M., the court ordered a recess, until 10:00 oclock A. M. Tuesday, May 26th, 1953. Before recessing the court instructed the jury as to the law, the court then placed the jury into the custody of the Criminal Sheriff for the night. The court then ordered the defendant, remanded.

MINUTE ENTRY OF MAY 26, 1953

Indictment for violating R. S. 14:42

The defendant accompanied by his counsels, G. Fust Esq., and G. Schreiber Esq., was placed at the bar of the court. The State being represented by Ass't. District Attorneys, George Gulotta and Peter J. Compagno. The empanelling of the jury for this case having been completed last night at 8:45 P. M. The court having at that time ordered a recess until this morning at 10:00 A. M. The jurors were then placed in the jury box. The jury was polled by the clerk, and all jurors found to be present. Counsels for the defendant, herewith, filed with the court application for writ of subpoena Duces Tecum, said application, being denied by the Court to which ruling of the court counsels for the defendant, object and reserved a bill of exceptions. The clerk read the indictment to the jury. The State made its opening statement. The defense made an opening statement. The defense requested that the court's charge to the jury be in writing, said request was granted by the court. Earl Burmaster, A. J. Palumbo, Raymond Johnson, John A. Dahman, Estelle Schneider,

Dr. R. Gillespie, Rosemary Misurata, Patricia Daniels, Patrick Natal and Capt. Wm. Walker, were duly sworn by the clerk, testified on the part of the State and were cross-examined on behalf of the defense. After the testimony of Dr. Gillespie, and, before the testimony of Rosemary Misurata, On motion of the State, the court, along with the jury, the defendant and his counsels, retired to the Coroner's office to view some color slides, the actual time consumed, being from 5:20 P. M. to 5:35 P. M. Counsels for the defendant, objected, to the ruling of the court in this matter, and reserved a bill of exceptions. In connection with the testimony of Estelle Schneider the State introduced as evidence the following: One picture, S-1; One picture, S-2; One Picture, S-3; One Picture, S-4; One Picture, S-6; One Picture, S-7; One Picture, S-8; Panties of the Victim, S-12; Clothing, shirt and bluejeans of the witness, S-13; No objection by the defense to any of the introductions, thus far. In connection with the testimony of the same witness, the State introduced as evidence, the following: Purse and contents, of the witness, S-14, Objection, by the defendant, Overruled by the court, Bill of exceptions reserved. Two pictures, S-10 and S-11, Objection by the defense to both pictures, Overruled, by the court, Bill of exceptions, reserved. Seven (7) color slides, S-9, Objection by the defense, Overruled by the court, Bill of exceptions, reserved. There were many oral motions for Mistrial, made by the defense, (taken by Court Stenographer) all being, Denied, by the Court, Bills of Exception, reserved by the defense. During the testimony of Capt. Walker, the hour being 11:00 P.M. the court ordered a recess in this matter to 10:00 A. M. to-morrow, morning. Before recessing the court instructed the jury, according to law. The court then placed the jury in the custody of the Criminal Sheriff for the night. The court then ordered the defendant, remanded.

11

12 MINUTE ENTRY OF MAY 27, 1953

Indictment for violating R. S. 14:42.

The defendant, accompanied by his counsels, G. E. Schreiber, Esq., and C. Fust Esq., was placed at the bar of the court. The State being represented by Assistant District Attorneys, Geo. Guiotta Esq., and Peter J. Compagno Esq. This case having been recessed last night (May 26th., 1953) at 11:00 P. M. until 10:00 A. M. this morning, The jurors were placed in the jury box. The clerk polled the jury, all jurors, were present. Capt. Wm. Walker, Albert Pierre and John Haggerty, were duly sworn by the clerk, testified on the part of the State and were cross-examined on behalf of the defense. In connection with the testimony of Capt. Walker, the State introduced as evidence a white envelope addressed to Jonn Michel, S-15, to which introduction, objection was made by the the defense, the court overruled, said objection, to which ruling of

the court, counsels for the defendant reserved a bill of exceptions. In connection with the testimony of J. Haggerty, The State introduced as evidence the following: Gold Wristwatch, S-16, Black Stone Ring, S-17; Gold band ring, S-18. Counsels for the defendant, objected to the three, aforementioned, introductions, which objections were overruled by the court, to which ruling of the court counsels for the defendant, reserved Bills of exception. At this point on motion of the defense, the jury was retired to the jury room, in order to allow the court, to hear evidence as well as rule, on the admissibility of a confession. The hour being 11:40 A.M. Out of the presence of the jury, the following named witnesses, to-wit: Sgt. N. Wirth, Off. E. Larson, Off. T. Claven, Off. O. Kuasmol, Sgt.
13 J. Mariana, Off. R. Walsh, Off. J. Parker, Off. J. Ventrolia, Sgt. V. Mancuso, Off. A. Otillo, Off E. Landry, Off. H. Swanson, Det. W. Daniels, Capt. W. Walker and Off. D. Forestiere, were duly sworn by the clerk, testified on the part of the State and were cross-examined on behalf of the defense. Submitted by the State, as to the admissibility of the confession. Still, out of the presence of the jury, The defendant, John Michel, was duly sworn by the clerk, testified on the part of the defense and was cross-examined on behalf of the State. Submitted, by the defense as to the admissibility of the said confession. The court ruled that the alleged confession was made freely and voluntarily and should be read to the jury. To which ruling of the court counsels for the defendant objected and reserved a bill of exceptions. At this point the jury was returned into open court. The hour was 5:00 P. M. The following named witnesses, to wit: Sgt. N. Wirth, Off. E. Larson, Off. T. Claven, Off. O. Kuasmol, Sgt. J. Mariano, Off. R. Walsh, Off. J. Parker, Off. J. Ventrolia, Sgt. V. Mancuso, Off. E. Landry, Off. R. Otillo, Det. W. Daniels, Capt. W. Walker, Off. D. Forestiere and Off. H. Swanson, were duly sworn by the clerk; testified on the part of the State and were cross-examined on behalf of the defense. In connection with the testimony of all the aforementioned witnesses, the State introduced as evidence, an alleged confession of the defendant, S-19. The defense objected to the introduction of the alleged confession, the court overruled said objection, to which ruling of the court counsels for the defendant reserved a bill of exceptions.

Still in connection with all of the aforementioned witnesses,
14 the State introduced as evidence the following: One pair of blue jeans, S-20. One light green shirt, S-21. One green and yellow sport shirt, S-22. No objection by the defense. The State rests. The following named witnesses, to-wit: Geo. Fleet, Ike Dupree, Marcel Scorza, Geo. Fust, Father Gregory Frank, Mrs. E. Jenkins, J. L. Ellsworth, L. J. Vaccaro and Adam Clouate, were duly sworn by the clerk, testified on the part of the defense and were cross-examined on behalf of the State. In connection with the

testimony of G. Fust, the defense introduced as evidence, a instanter subpoena on one Ronald Parker, D-1. The defense rests. The hour being 10:00 P.M. the court ordered a recess, until to-morrow, at 10:00 A.M. Before recessing the court instructed the jury as to the law, the court then placed the jury into the custody of the Criminal Sheriff for the night. The court then ordered the defendant remanded.

MINUTE ENTRY OF MAY 28, 1953

Indictment for violating R. S. 14:42

Verdict

The defendant accompanied by his counsels, G. Fust Esq., and G. Schreiber, Esq., was placed at the bar of the court. The State being represented by Ass't. Dist. Attorneys, George Gulotta Esq., and Peter J. Compagno Esq., Both State and Defense having rested Last night before adjournment: Court adjourned last night at 10:00 P. M. until 10:00 A. M. this morning for argument. The jury was placed in the jury box, polled by the clerk and found to be all present. Counsels for the defendant filed with the court eight (8) special charges. Mr. Compagno, Made the State's opening argument. Mr. Fust, then, Mr. Schreiber, both, argued for the defense. Mr. Gulotta, made the State's closing argument. The court,
15 Denied, all eight (8) of the defendant's special charges, to which ruling of the court counsels for the defendant, objected and reserved Bills of exception. The Court delivered its charge to the jury at the hour of 3:25 P. M. and at the close of said charge, the court presented the jury with a written list of the responsive verdicts. The jury retired to deliberate at the hour of 3:55 P. M. and returned into open court at the hour of 6:10 P. M. with the following verdict: "May 28th., 1953. Guilty as charged. (signed) Wilfred J. Drez, Foreman." On motion of the defense, the court ordered the jury polled. The clerk polled the jury and the verdict found to be unanimous. The court then ordered the verdict of the jury recorded and filed, along with the list of responsive verdicts, returned by the jury, said written list of responsive verdicts, previously having been presented the jury by the court, according to law. The court's charge being written, said charge was filed in the record. The petty jury was then discharged by the court. The defendant was then remanded to await further legal proceedings.

MINUTE ENTRY OF JULY 6, 1953

Indictment for violating R. S. 14:42

The defendant accompanied by his counsels G. Fust Esq., and G. Schreiber Esq., was placed at the bar of the court. The defend-

ant, through his counsels did this day file with the court A motion for a New Trial and Motion in Arrest of Judgment. By agreement, the court ordered both these matters specially fixed for hearing on Monday July 13, 1953. The defendant was then remanded.

16 MINUTE ENTRY OF JULY 13, 1953

Indictment for violating R.S. 14:42.

The defendant accompanied by his counsels G. Fust Esq., and G. Schreiber Esq., was placed at the bar of the court, for hearing on a motion for a new trial and motion in arrest of judgment. Motion for a New Trial, argued by State and defense and submitted, the court Overruled, Defendant's motion for a new trial, to which ruling of the court counsels for the defendant, objected, and reserved a bill of exceptions. Motion in arrest of Judgment, argued by State and defense, and submitted. The court denied defendant's motion in arrest of judgment, to which ruling of the court counsels for the defendant objected and reserved a bill of exceptions. The defendant was then ordered, remanded to await further legal proceedings.

MINUTE ENTRY OF AUGUST 6, 1953

Indictment for violating R.S. 14:42.

On motion of G. Schreiber Esq., counsel for the defendant, the court continued this sentence to August 17th., 1953 and ordered the defendant, remanded.

MINUTE ENTRY OF NOVEMBER 2, 1953

Indictment for violating R.S. 14-42.

G. Fust Esq., and G. Schreiber Esq., on behalf of the defendant, did this day file with the court a supplemental motion for a new trial. The court took the said motion under advisement, until Tuesday November 3rd., 1953. The defendant was then remanded.

17 MINUTE ENTRY OF NOVEMBER 3, 1953

Indictment for violating R.S. 14:42

The defendant accompanied by his counsel G. Fust Esq., was placed at the bar of the court. The court DENIED defendant's supplemental motion for a new trial, filed, on Monday November 2nd., 1953. To which ruling of the court counsel for the defendant objected and reserved a bill of exceptions. Counsel for the defendant, herewith presented to the court 42 Bills of exception. The court ordered said Bills, filed by the clerk. The court ordered that this matter be continued to Monday November 9th., 1953 for sentence. The defendant was then ordered remanded.

MINUTE ENTRY OF NOVEMBER 9, 1953

Indictment for violating R.S. 14:42.

Sentence

The defendant accompanied by his counsel G. Fust Esq., was placed at the bar of the court for sentence. The court having signed all bills of exception at 9:00 o'clock A.M. This date. The court further, having written and signed all per curiams, at 9:30 o'clock A.M. this date, ordered same filed by the clerk. The defendant being ready for sentence, the court sentenced the defendant, as follows: "JOHN MICHEL, the jury in your case having found you guilty of aggravated rape as charged in the indictment found against you by the Grand Jury of the Parish of Orleans, it is hereby ordered, and it is the sentence of the Court that you, JOHN MICHEL, be remanded to the Parish Prison, of the Parish of Orleans, there to remain in the custody of the Criminal Sheriff of the Parish of Orleans, until your execution, on such day, at such hour and place as may be designated in his warrant by the Governor of the State of Louisiana; and your execution be caused by the
18 passing through your body a current of electricity of sufficient intensity to cause death, and by the application and continuance of such current through your body until you are dead, as prescribed by Act 14 of the regular session of the Legislature of the State of Louisiana, for the year, 1940.

Pronounced in open court, in the presence of the accused, his counsel and the District Attorney of the Parish of Orleans, on this 9th day of November, 1953, at 10:30 o'clock A.M.

(Signed) NIELS F. HERTZ; *Judge*."

Counsel for the defendant, G. Fust Esq., herewith, presented to the court a motion for a Suspensive Appeal to the Honorable, The Supreme Court of the State of Louisiana. The said motion being filed by the clerk. The court granted said motion for appeal, signing same at 10:35 o'clock A.M. this date. Date returnable, being, January 4th., 1954. The court then ordered the defendant remanded without benefit of bail.

19 IN THE CRIMINAL DISTRICT COURT, PARISH OF ORLEANS.
SECTION "F"

INDICTMENT

The Grand Jurors of the State of Louisiana, duly impaneled and sworn in and for the body of the Parish of Orleans, in the name and by the authority of the said State, upon their oath, Present That one JOHN MICHEL late of the Parish of Orleans on the tenth day of February in the year of our Lord, one thousand, nine hun-

dred fifty-three with force and arms in the Parish of Orleans aforesaid, and within the jurisdiction of the Criminal District Court for the Parish of Orleans committed aggravated rape upon one ESTELLE SCHNEIDER, contrary to the form of Statute of the State of Louisiana in such cases made and provided and against the peace and dignity of the same.

(Signed) SEVERN T. DARDEN,
District Attorney for
the Parish of Orleans.

Copy of Indorsements Appearing on Indictment

No. 141-241, Section "F", State of Louisiana versus John Michel, Indictment for Vio. R.S. 14:42 (Aggravated Rape).

A True Bill. (Signed) J. Milton deBen, Foreman of Grand Jury. New Orleans, Feb. 19, 1953.

Returned into open Court and recorded and filed February 19th, 1953. (Signed) A. B. Humphrey, Minute Clerk.

2-19-53. Alias Capias issued—no bail.

20 Feb. 23, '53.

On motion of the Def. the court granted the Def. until Monday, March 2, 1953 in which to employ counsel. This arraignment cont'd. to said date.

(Signed) W. J. HAMMER,
Minute Clerk.

March 2, '53.

The court appointed Mr. G. Schreiber Esq. to represent the Def. and ordered this arraignment cont'd. to Monday, Mar. 9, 1953.

Mar. 9, 1953.

Motion to Quash filed by def. Specially fixed for hearing on March 23, '53. On joint motion of State and Def. the court ordered this case specially fixed for trial on May 25, '53. Notify all witnesses.

(Signed) W. J. HAMMER,
Minute Clerk.

March 23, '53.

The State filed written answer and Demurrer to Def's. motion to Quash. The court allowed the defense counsel to March 30, '53, to prepare answer to State's Demurrer.

(Signed) W. J. HAMMER,
Minute Clerk.

March 30, '53.

The defense did this day file Answer to the State's Demurrer previously filed. The court after hearing evidence and argument by both sides, took this matter under advisement until Wed. April

8, 1953, at which time, the court informed both sides that it (the court) would render a decision. The court further instructed the State and Defense to submit any law, by way of Briefs before said date, set for decision in this matter.

(Signed) W. J. HAMMER,
Minute Clerk.

21 April 8, '53.

The court did this day sustained the Demurrer, filed by the State and further the court dismissed the Motion to Quash filed by the defense. On motion of the defense the court granted defendant until April 22, 1953, to file any further special pleadings.

(Signed) W. J. HAMMER,
Minute Clerk.

April 22, 1953.

Counsels for the defendant this day filed with the court a Motion to perpetuate testimony. The court denied said motion. Counsels for Def. then filed a motion for a Bill of Particulars, the court granted Def's motion and ordered the State to furnish the particulars requested on or before April 27th '53. Counsels for the Def. further filed with the court, Prayer for Over. The court ordered the State to show cause on April 27th '53, why relief prayed for in defendant's Prayer for Over should not be granted.

(Signed) W. J. HAMMER,
Minute Clerk.

April 27, '53.

The State filed written answer to Def's Bill of Particulars, the defense accepted said answer to its sufficiency and the court ruled accordingly. The State filed written answer to Def's prayer for Over. The court ruled the State's answer sufficient in law, to which ruling of the court the def. objected and reserved a bill. The court granted the defense to April 29, '53, to file further pleadings.

(Signed) W. J. HAMMER,
Minute Clerk.

April 29, '53.

Counsels for the defendant this day filed with the court a motion for supplemental bill of particulars. The court ordered the state to show cause on May 4, '53, why the particulars requested should not be granted.

(Signed) W. J. HAMMER,
Minute Clerk.

22 April 30, '53.

The State did this day filed with the court written answer to def's. motion for supplemental bill of particulars.

(Signed) W. J. HAMMER,
Minute Clerk.

May 4, '53.

The court ruled that the answer filed by the state on April 30, '53, to def's motion for supplemental bill of particulars was sufficient in law, to which ruling of the court counsel for the def. objected and reserved a bill of exceptions. The def. was then arraigned. The clerk read the Indictment to Def. and pleaded not guilty. This matter specially fixed for trial on May 25, '53. Notify all witnesses.

(Signed) W. J. HAMMER,
Minute Clerk.

May 25, '53.

Trial of this case started and jury selected (see minutes).

(Signed) W. J. HAMMER,
Minute Clerk.

May 26, '53.

Trial of this case in progress and testimony being taken.

May 28, 1953.

Guilty as charged.

(Signed) WILFRED J. DREZ,
Foreman.

May 28, '53.

The defendant remanded to await sentence.

(Signed) W. J. HAMMER,
Minute Clerk.

23 July 6, '53.

Counsels for the defendant this day filed with the court, motion for a new trial, and, motion in arrest of judgment. By agreement, the court ordered this matter (both motions) specially fixed for hearing Monday July 13, 1953.

(Signed) W. J. HAMMER,
Minute Clerk.

July 13, '53.

Motion for New trial overruled by court, to which defense objected and reserved a bill of exceptions. Motion in Arrest of

Judgment denied by the court, to which the Defense objected and reserved a bill of exceptions.

(Signed) W. J. HAMMER,
Minute Clerk.

August 6, 1953.

On motion of defense, the court continued sentence in this case to August 17, '53.

(Signed) W. J. HAMMER,
Minute Clerk.

Nov. 2, '53.

Supplemental motion for new trial filed by defense. Specially fixed for Nov. 3, '53.

(Signed) W. J. HAMMER,
Minute Clerk.

Nov. 3, '53.

Supplemental motion for new trial overruled by court, counsel for def. objected and res. a bill of exception. G. Fust Esq., counsel for defendant, this day filed with the court 43 bills of exception. The court ordered said exceptions filed and set Monday November 9, '53 as the day for sentence.

(Signed) W. J. HAMMER,
Minute Clerk.

24 Nov. 9, '53.

The defendant accompanied by his counsel G. Fust, Esq., was placed at the bar of the court for sentence. The court this day signed the Bills of exception (42) filed by defendant Nov. 3, '53. The court this day ordered filed, and signed its per curiams to all of defendants Bills of exceptions. The court then sentenced the defendant to death by electricity (see record). Counsel for def. G. Fust Esq., herewith filed with the court motion for suspensive appeal. The court signed the motion for appeal making same returnable January 4, 1954. The defendant was then remanded.

(Signed) W. J. HAMMER, *Minute Clerk.*

[File endorsement omitted]

IN THE CRIMINAL DISTRICT COURT, PARISH OF ORLEANS, SECTION "F"

[Title omitted]

MOTION TO QUASH—Filed March 9, 1953

Now into this Honorable Court comes John Michel, defendant herein, and having heard the Indictment read and protesting that he is not guilty of the offense set out therein, moves to quash the said Indictment in its entirety and to quash and set aside

the general venire involved herein and to quash and set aside the Grand Jury Panel herein for the reason that in the proceedings prior to and attending the presentment of said Indictment, mover was deprived of due process of law and equal protection of law as guaranteed by the Constitution of the United States and the State of Louisiana, as follows:

25 1. Defendant is a member of the colored race.

2. That considering the negro population of the Parish of Orleans and the number of negroes qualified for jury service, there has been systematic, unlawful and unconstitutional exclusion of negroes from the general venire and Grand Jury Panel and Grand Jury involved in the returning of the Indictment herein; that said systematic, unlawful and unconstitutional exclusion of negroes from said units has existed continuously prior hereto for a number of years in the Parish of Orleans; that said exclusion has existed because of race or color; that a negro has never served on a Grand Jury in the Parish of Orleans; that in those instances where negroes have been included in the general venire and Grand Jury Panels referred to herein, negroes have been discriminated against by an arbitrary and inapportionate limiting of their number by State officials who have not sufficiently acquainted themselves with the qualifications of all potential jurors.

WHEREFORE, the said John Michel prays that this Motion to Quash be maintained and that the said Indictment, general venire and Grand Jury Panel be declared null and void and that he be discharged from said Indictment.

(Signed) GERARD H. SCHREIBER,
GEORGE H. FUST,
Attorneys for Defendant.

Duly sworn to by John J. Michel, jurat omitted in printing.

26 March 9, '53.

Let the State of Louisiana through the District Attorney, show cause on the 16th day of March 1953, at 10:30 o'clock A.M., why the relief prayed for should not be granted.

(Signed) NIELS F. HERTZ,
Judge.

[File endorsement omitted]

IN THE CRIMINAL DISTRICT COURT, PARISH OF ORLEANS, SECTION "F"

[Title omitted]

ANSWER AND DEMURRER TO MOTION TO QUASH—Filed March 23, 1953

Now into Court comes the State, represented herein by Peter J. Compagno and George J. Gulotta, Assistant District Attorneys for the Parish of Orleans, and answering the Motion to Quash filed herein; now offer the following answer and demurrer:

1. That the said Motion to Quash is not good in law and of no legal effect for the reason that the said motion was not filed, pleaded and urged before the expiration of the third judicial day of the Grand Jury term for the Parish of Orleans, State of Louisiana, by which the defendant herein was indicted.

2. That the defendant, as shown by the indictment herein, was indicted and the indictment returned and filed in open Court on February 19, 1953, in Section "F" of the Criminal District Court for the Parish of Orleans, as shown by the endorsement on the back of the said indictment itself.

27 3. That the Grand Jury that indicted the defendant herein as shown by the records and minute entries of the said Court offered and filed in evidence herein, was impanelled, selected and sworn, and went into office on the 2nd day of September, 1952, as shown by the record and minute entries of the said Court, and that the said Grand Jury was discharged on March 2, 1953; and that under the provisions of R. S. 15:262, any objection to the manner of selecting or drawing a Grand Jury, or any defect or irregularity in the impanelling and selection of a Grand Jury, must be urged before the expiration of three judicial days after the Grand Jury term expires, or before entering upon the trial of the case, if it be done sooner.

4. That the Motion to Quash was filed herein on the 9th day of March, 1953, as shown by the endorsement on the back of the Bill of Indictment itself, more than three judicial days after the expiration of the Grand Jury term of the Grand Jury that indicted the defendant herein.

WHEREFORE, the State prays that this Honorable Court sustain the answer and demurrer to the Motion to Quash the indictment herein, and dismiss the Motion to Quash as being of no legal effect.

(Signed) PETER J. COMPAGNO,
Assistant District Attorney.
GEORGE J. GULOTTA,
Assistant District Attorney.

New Orleans, Louisiana,
March 23rd., 1953.

April 8, 1953.

The demurrer of the State of Louisiana is sustained and accordingly the Motion of defendant to Quash the Indictment is dismissed.

(Signed) NIELS F. HERTZ,
Judge

[File endorsement omitted]

28 IN THE CRIMINAL DISTRICT COURT, PARISH OF ORLEANS, SECTION "F"

[Title omitted]

ANSWER TO DEMURRER—Filed March 30, 1953

Now into this Honorable Court comes John Michel, defendant herein, appearing through undersigned counsel, and for answer to the Demurrer filed in behalf of the State of Louisiana to defendant's Motion to Quash, says:

1. That defendant, in support of his Motion to Quash the indictment and to quash and set aside the Grand Jury Panel and the Grand Jury which indicted him, was prepared to prove:

(1) That defendant is a member of the colored race.

(2) That the three jury commisisoners who set up the general venire and the Grand Jury Panel from which the Grand Jury was selected which returned the indictment of defendant, plus all State Officials in any way connected with the returning of the indictment are all white men and are members of the Caucasian race.

(3) That the twelve members of the Grand Jury which returned this indictment on February 19, 1953 are all white men and are of the Caucasian race.

(4) That no negro has served on the Grand Jury for the Parish of Orleans for the past thirty years, with the exception of one man who served approximately sixteen years ago, by the name of Ruffin J. Walker, who, at the time of his acceptance on the Grand Jury, was believed to be a white man due to his light color.

(5) That the population of the City of New Orleans or Parish of Orleans, from which the jurors are chosen, according to the United States Department of Commerce, Bureau of the Census, is divided as to negro and white, as follows, for the years indicated:

29

Year	*White*	*Negro*
1930	328446	129632
1940	344775	149034
1950	459400	227300

(6) That the number of registered voters of the City of New Orleans or Parish of Orleans was divided on the dates indicated below, as follows:

	White	*Negro*
October 7, 1950	186866	26029
March 1, 1952	194794	25545

(7) That there is, and has been for many years past, a large number of colored males who can meet the qualifications fixed by law for grand jurors.

(8) That colored males have been serving in the Federal Courts in New Orleans on petit juries and grand juries for fifty years and more.

(9) That there has been one colored university in existence in the City of New Orleans since 1869, and that there have been at least two in existence since 1915.

(10) That there are four complete public high schools for colored; two junior high schools for colored; and four parochial high schools for colored, in the City of New Orleans and Parish of Orleans.

(11) That the colored public high schools in the City of New Orleans and Parish of Orleans have graduated over 5,200 students; and the colored parochial high schools have graduated over 800 students.

(12) That in 1952, in the elementary grades, there were 28,295 white students in schools for whites, and 25,896 colored students in schools for colored; that in 1942, in the elementary grades, there were 27,824 white students in schools for whites, and 20,612 colored students in schools for colored, all of these schools being public schools.

(13) That there are twelve or more insurance companies in the City of New Orleans exclusively owned and operated by colored persons.

(14) That there are more than fifty colored physicians in the City of New Orleans, about one dozen colored dentists, and ten or more colored pharmacists; and that there have been two weekly colored newspapers owned and operated by colored personnel in the City of New Orleans for several years.

(15) That there is a colored hospital in the City of New Orleans, the staff of which is about evenly divided between colored and white doctors.

(16) That one of the insurance companies mentioned in (13) above has assets of over $2,000,000.00, and employs some two hundred colored persons in the operation of its business.

(17) Plus other facts, in addition to the ones listed in Nos. (1) thru (16) above, to show that there has been intentional

and or systematic exclusion of negroes from grand juries in the Parish of Orleans, and the grand jury which returned the indictment against defendant.

2. That the alleged error of defendant's having filed his Motion to Quash after the expiration of the third judicial day of the term for which said grand jury shall have been drawn, as urged by the State in its Demurrer to Motion to Quash, is merely procedural; that the errors complained of in defendant's Motion to Quash are sufficiently serious and prejudicial under our jurisprudence to warrant the quashing of the indictment.

3. That the position urged by the District Attorney for the State in its demurrer is contrary to the time honored judicial practice in the Parish of Orleans and State of Louisiana, including the term of the present District Attorney, which was to permit motions to quash, such as that filed herein to be filed at any time
31 before trial, even after defendants had been arraigned and pleaded and were permitted to withdraw their pleas and file such motions.

4. That Code of Criminal Procedure Article 202 is subject to a liberal interpretation in favor of the defendant.

5. That if not liberally construed in favor of defendant's Motion to Quash, Code of Criminal Procedure Article 202 is unconstitutional because it denies due process and equal protection as guaranteed under the Constitutions of the United States and of the State of Louisiana.

6. The limitation upon the rights of the defendant which the District Attorney places in his interpretation of Code of Criminal Procedure Article 202 denies defendant the right even to make the objection that he was denied the equal protection of the laws, and any act, so interpreted, is in violation of the rights and guarantees afforded an accused under the Constitutions of the United States and of the State of Louisiana.

7. That defendant did not have any attorney representing him until one was appointed by this Honorable Court, notice of which said appointment was not received by the attorney until the third judicial day following the expiration of the term of the Grand Jury which indicted defendant, and a second attorney was appointed on the 4th judicial day following the expiration of the Grand Jury term; that defendant was scheduled for arraignment on the 5th judicial day following the expiration of the Grand Jury term, and filed his motion to Quash before the indictment was read and before any plea could be made, although defendant, through his attorneys, incorrectly stated in his Motion to Quash that he was filing and urging same ". . . having heard the indictment read and protesting he is not guilty."

8. That the law is not unreasonable; that it is unreasonable to expect counsel, one of whom was appointed by the Court on the third judicial day following the expiration of the term of the Grand Jury which indicted defendant, and the other of whom was appointed on the fourth judicial day following the expiration of the
32-37 Grand Jury term, to file a Motion to Quash within the three day period provided for in Criminal Code of Procedure Article 202, as urged by the District Attorney.

(Signed) GERARD H. SCHREIBER,
GEORGE H. FUST,
Counsel for defendant.

Duly sworn to by John J. Michel; jurat omitted in printing.

38-67 [File endorsement omitted]

IN THE CRIMINAL DISTRICT COURT, PARISH OF ORLEANS, SECTION "F"

[Title omitted]

MOTION TO PERPETUATE TESTIMONY AND DENIAL THEREOF—Filed April 22, 1953

Now into this Honorable Court comes John Michel, defendant herein, and having heard the Court sustain the State's Demurrer to defendant's Motion to Quash, and having excepted and objected to said ruling, moves that the Court at this time allow defendant to produce witnesses and perpetuate their testimony in support of defendant's Motion to Quash.

WHEREFORE, the said John Michel prays that this Motion to Perpetuate Testimony be sustained.

(Signed) GERARD H. SCHREIBER,
GEORGE H. FUST,
Attorneys for Defendant.

Duly sworn to by John J. Michel; jurat omitted in printing.

April 22, 1953.

In view of my previous ruling on the Demurrer filed by the State of Louisiana, the motion is denied.

(Signed) NIELS F. HERTZ,
Judge.

68 [File endorsement omitted]

IN THE CRIMINAL DISTRICT COURT, PARISH OF ORLEANS, SECTION "F"

[Title omitted]

MOTION FOR A NEW TRIAL—Filed July 6, 1953

69 And now into court comes John Michel, Defendant herein, through Gerard H. Schreiber and George Fust, Attorneys for Defendant, and moves the Court that the verdict of the jury be set aside and a new trial ordered, for the following reasons, to-wit:

I

That the verdict of the jury is contrary to the law and the evidence and is to the prejudice of the defendant.

II

That the evidence offered by the State was inconclusive and failed to prove beyond a reasonable doubt that the Defendant, John Michel, was guilty of the crime for which he had been indicted.

III

That the allegations and affirmations contained in the pleadings previously filed in connection herewith, together with the objections urged and errors complained of in the course of the trial, conclusively show that the defendant should be granted a new trial, which pleadings and objections are realleged and made part of this motion as fully as though copied herein in extenso.

WHEREFORE, your Defendant prays that, after due proceedings had, the verdict of the jury be set aside and a new trial ordered herein.

(Signed) GERARD H. SCHREIBER,
GEORGE H. FUST,
Attorneys for Defendant.

Duly sworn to by John Michel; jurat omitted in printing.

70 July 6, 1953.

Let the District Attorney show cause on the 13th day of July, 1953, at 10:30 o'clock A.M., why the relief prayed for should not be granted.

(Signed) NIELS F. HERTZ,
Judge.

July 13, 1953.

The motion for a new trial is overruled.

(Signed) NIELS F. HERTZ,
Judge.

[File endorsement omitted]

IN THE CRIMINAL DISTRICT COURT, PARISH OF ORLEANS, SECTION "F"

[Title omitted]

MOTION IN ARREST OF JUDGMENT—Filed July 6, 1953

And now, after verdict against John Michel, and before sentence, comes the said John Michel, appearing herein through Gerard H. Schreiber and George Fust, Attorneys at Law, and moves the Court here to arrest judgment herein, and not to pronounce the same because of manifest errors in the record appearing, to-wit:

I

That this Court is without authority to sentence your defendant for all of the reasons set forth, alleged and affirmed in the Motion to Quash, the Answer to the Demurrer filed by the State, and other pleadings filed herein in connection with this cause, which your defendant makes a part hereof, together with the evidence taken thereon, as fully as though set out herein in extenso.

71

II

That for these reasons and all of the other reasons set forth and alleged in the preliminary motions filed and the bills of exception reserved during the trial, that this Court cannot now legally sentence your defendant.

WHEREFORE, your defendant prays that their motion be considered and that no judgment against him, the said John Michel, can be lawfully rendered on said record.

(Signed) GERARD H. SCHREIBER,
Attorney for Defendant.
GEORGE H. FUST,
Attorney for Defendant.

Duly sworn to by John Michel, jurat omitted in printing.

July 6, 1953.

Let the District Attorney show cause on the 13th day of July 1953, at 10:30 o'clock A. M., why the relief prayed for should not be granted.

(Signed) NIELS F. HERTZ,
Judge.

July 13, 1953.

The motion in arrest of judgment is denied.

(Signed) NIELS F. HERTZ,
Judge.

72 IN THE CRIMINAL DISTRICT COURT, PARISH OF ORLEANS.
SECTION "F"

[Title omitted]

SUPPLEMENTAL MOTION FOR A NEW TRIAL—Filed November 2, 1953.

And now into Court comes John Michel, Defendant herein, through Gerard H. Schreiber and George H. Fust, Attorneys for the Defendant, and moves the Court that the verdict of the jury be set aside and a new trial ordered for the following reasons, to-wit:

I

That error was committed by this Honorable Court in overruling Defendant's Motion to Quash for the reasons that the Grand Jury which returned the indictment was impanelled in violation of the equal protection clause of the 14th Amendment of the Constitution of the United States, and the Civil Rights Act of the United States Congress which was enacted in pursuance of and for the purpose of carrying out the equal protection guarantee of said 14th Amendment, being 18 Stat. 336, 8 U.S.C. paragraph 44.

The Fourteenth Amendment to the Constitution of the United States reads:

> "No State shall . . . . . deny to any person within its jurisdiction the equal protection of the laws."

The Act of Congress quoted above reads:

> "No citizen possessing all other qualifications . . . . . shall be disqualified for service as grand or petit juror in any court of the United States or any State, on account of race, color, or previous condition of servitude."

In this connection, mover herein was, by the ruling of this Court, denied the right to prove to this Honorable Court the following facts which were alleged herein in our Answer to the Demurrer To the Motion to Quash, and which facts, under the case of Patton v. State of Mississippi, decided by the Supreme Court of the United States in 68 S. Ct. 184, makes out a prima facie case of the denial of the equal protection of the laws.

73 Defendant, through his counsel, was prepared, but was denied the right to show the following facts:

(1) That Defendant is a member of the colored race.

(2) That the three jury commissioners who set up the general venire and the Grand Jury Panel from which the Grand Jury

was selected which returned the indictment of defendant, plus all State officials in any way connected with the returning of the indictment are all white men and are members of the Caucasian race.

(3) That the twelve members of the Grand Jury which returned this indictment on February 19, 1953 are all white men and are of the Caucasian race.

(4) That no Negro has served on the Grand Jury for the Parish of Orleans for the past thirty years, with the exception of one man who served approximately sixteen years ago, by the name of Ruffin J. Walker, who, at the time of his acceptance on the Grand Jury was believed to be a white man due to his light color.

(5) That the population of the City of New Orleans or Parish of Orleans from which the jurors were chosen, according to the United States Department of Commerce, Bureau of Census, is divided as to negro and white, as follows, for the years indicated:

Year	White	Negro
1930	328446	129632
1940	344775	149034
1950	459400	227300

(6) That the number of registered voters of the City of New Orleans or Parish of Orleans was divided on the date indicated below, as follows:

Year	White	Negro
October 7, 1950	186866	26029
March 1, 1952	194794	25545

74 (7) That there is and has been for many years past a large number of colored males who can meet the qualifications fixed by law for grand jurors.

(8) That colored males have been serving in the Federal Courts in New Orleans on petit juries and grand juries for fifty years or more.

(9) That there has been one colored university in existence in the City of New Orleans since 1869, and that there have been at least two in existence since 1915.

(10) That there are four complete public high schools for colored; two junior high schools for colored; and four parochial high schools for colored, in the City of New Orleans and Parish of Orleans.

(11) That the colored public high schools in the City of New Orleans and Parish of Orleans have graduated over

5,200 students, and the colored parochial high schools have graduated over 800 students.

(12) That in 1952, in the elementary grades, there were 28,295 white students in schools for whites, and 25,896 colored students in schools for colored; that in 1942, in the elementary grades, there were 27,824 white students in schools for whites, and 20,612 colored students in schools for colored, all of these schools being public schools.

(13) That there are twelve or more insurance companies in the City of New Orleans exclusively owned and operated by colored persons.

(14) That there are more than forty colored physicians in the City of New Orleans, about one dozen colored dentists, and ten or more colored pharmacists; and that there have been two weekly colored newspapers owned and operated by colored personnel in the City of New Orleans for several years.

75 (15) That there is a colored hospital in the City of New Orleans, the staff of which is about evenly divided between colored and white doctors.

(16) That one of the insurance companies mentioned in (13) above has assets of over $2,000,000.00, and employs some two hundred colored persons in the operation of its business.

(17) Plus other facts, in addition to the ones listed in Nos. (1) through (16) above; to show that there has been intentional and/or systematic exclusion of negroes from grand juries in the Parish of Orleans, and the grand jury which returned the indictment against defendant.

That the above factual allegations are matters of common public knowledge in the City of New Orleans and Parish of Orleans, and are matters of specific knowledge to your Honor and the other judges of the Criminal District Court for the Parish of Orleans because said factual matters have been established by judges in these Courts in several similar instances, particularly, in State v. Cargile, No. ————, of the Docket of this Honorable Court; State v. Green, No. ———— of the Docket of this Honorable Court; and State v. Dowels, No. ———— of the Docket of this Honorable Court; in which cases the judges of this Honorable Court have been called as witnesses, and have testified to some of the facts alleged hereinabove.

That with reference to the fact that no negro has ever been selected in the Parish of Orleans to serve on the Grand Jury, including the Grand Jury which returned the indictment herein, and the fact that there are a large number of negro citizens in the Parish of Orleans qualified to serve as jurors, on December 8, 1947, the

United States Supreme Court, in Patton v. State of Mississippi (supra), stated:

> "When a jury selection plan, whatever it is, operates in such ways as always to result in the complete and long-continued exclusion of any representation at all from a large group of negroes, or any other racial group, indictments and verdicts returned against them by juries thus elected cannot stand."

76 Counsel for Defendant were denied the right to show that there has been "complete and long-continued Exclusion of any representative at all from a large group of negroes" by your Honor; that your Honor in making said ruling followed the case of State v. Wilson, 204 La. 14 So. (2) 873; that said decision of the Supreme Court of the State of Louisiana is a denial of the equal protection clause because it denied the Defendant the right of proving a prima facie case of systematic exclusion of negroes from Grand Juries in the Parish of Orleans.

Our Supreme Court has frequently said:

> "Suffice it to say that the Supreme Court of the United States has declared in substance, that equal protection of the law requires that a colored person shall be afforded an opportunity to have members of his race serve upon the grand and petit jury in cases involving his life or liberty, and, therefore, any denial of this guarantee, either by a law which does not provide a fair mode of selection or by officers who systematically administer a valid law so as to accomplish gross inequalities, cannot be countenanced." State v. Perkins, 211 La. 998, 31 So. (2) 188.

Here we have a case where no colored man has ever served on a Grand Jury in the Parish of Orleans with the exception of one colored man who looked like a white man, and who was placed on the Grand Jury under the mistaken belief that he was a white man.

In State v. Perkins (supra), our Supreme Court further stated:

> "A legion of cases involving alleged racial discrimination in selection of grand and petit juries are to be found in the jurisprudence of the Supreme Court of the United States and this Court. These adjudications have settled all legal problems here presented and they have been many times cited and discussd by us in kindred matters."

With all honor and sincerest deference to our Supreme Court of Louisiana, counsel for mover herein respectfully avers that the decision of our Supreme Court in the case of State v. Wilson, supra, is a violation of the equal protection clause of the Fourteenth

Amendment and the Civil Rights Act of Congress enacted thereunder, and said decision, upon which your Honor has predicated his ruling sustaining the demurrer of the State to the Defendant's Motion to Quash, deprives mover of the equal protection of the laws of the State of Louisiana and of the United States, and
77 that said decision is an unreasonable and unwarranted and arbitrary interpretation of a State law.

To be specific, while it is a notorious and undisputed fact that with the exception of the one occasion that a negro who appeared to be a white man and was appointed on the Grand Jury because he was mistaken for a white man, no negro has ever served or been selected to serve on the Grand Jury in the Parish of Orleans, including the Grand Jury which indicted mover; and while it is also a fact of public knowledge that a very large percentage of the population of the Parish of Orleans are colored citizens of the State and of the United States, and are qualified for service on Grand Juries, no negro has ever served or been selected except as hereinabove alleged.

And while repeated decisions of the United States Supreme Court have determined that the above notorious and undisputed facts make out a prima facie case against the constitutionality of the Grand Jury which indicted mover herein, said decision of our Supreme Court in State v. Wilson, supra, deprives mover, and has up to now deprived mover of his right to put into the record of this case the aforesaid undisputed and notorious facts which the Supreme Court of the United States has held, repeatedly, as stated, makes out a prima facie case of the deprivation of mover's right to the equal protection of the laws of the State of Louisiana and of the United States, and establishes the nullity of the indictment upon which mover has been tried and convicted.

Continuing with our specifications, counsel for mover respectfully cite the statute at issue in said State v. Wilson, supra:

> "All objections to the manner of selecting or drawing any juror or jury or to any defect or irregularity that can be pleaded against any array or venire must be filed, pleaded, heard or urged before the expiration of the third judicial day of the term for which said jury shall have been drawn, or before entering upon the trial of the case if it be begun sooner; otherwise, all such objections shall be considered as waived and shall not afterwards be urged or heard." Article 202, Code of Criminal Procedure.

78. In said case our Honorable Supreme Court ruled that the aforementioned Article No. 202 of the Louisiana Code of Criminal Law and Procedure was applicable to grand jury panels as well as to petit jury panels. We respectfully submit that it is unreasonable to attempt to extend this statute as it is written

403 IN THE CRIMINAL DISTRICT COURT, PARISH OF ORLEANS, SECTION "F"

[Title omitted]

PER CURIAM TO BILL OF EXCEPTION No. 41—Filed November 9, 1953

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the State of Louisiana:

May it please the Court:

I overruled the supplemental motion for a new trial and give as my reasons the same reasons contained in my per curiam to bill of exception No. 1.

New Orleans, Louisiana,
November 9, 1953, 9:30 A.M.

Respectfully,

(S.) NIELS F. HERTZ,
Judge.

[File endorsement omitted]

[File endorsement omitted]

404 IN THE CRIMINAL DISTRICT COURT, PARISH OF ORLEANS,

[Title omitted]

BILL OF EXCEPTION No. 42—Filed November 3, 1953

Annexed:

Motion to Quash .....
Answer to Demurrer .....
Testimony taken on Answer to Demurrer .....

BE IT REMEMBERED that after verdict in the above entitled and numbered cause, and before sentence, your defendant, JOHN MICHEL, did file a Motion in Arrest of Judgment, which said Motion reads as follows:

Motion in Arrest of Judgment Omitted.

Printed side page 70 ante

405 WHEREUPON, the Court having overruled the motion, your defendant did then and there reserve a bill of exceptions, making the motion, the Court's ruling on the motion, the Motion to Quash filed by your defendant, the Answer to the Demurrer, the

testimony taken on the Answer to the Demurrer, part of the bill. And now showing that there was error to the prejudice of your defendant in the ruling of the Court, denying the Motion in Arrest of Judgment, your defendant presents this his formal Bill of Exception for signature.

New Orleans, Louisiana,
November 9, 1953, 9:00 A.M.

(S.) NIELS F. HERTZ,
Judge.

406-542 IN THE CRIMINAL DISTRICT COURT, PARISH OF ORLEANS, SECTION "F".

[Title omitted]

PER CURIAM TO BILL OF EXCEPTION NO. 42—Filed November 9, 1953

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the State of Louisiana:

May it please the court:

Counsel for the accused in his motion in arrest of judgment cites no other reasons than these already discussed in his motion for a new trial and other bills of exceptions, so accordingly, I denied the motion in arrest of judgment.

New Orleans, Louisiana,
November 9, 1953, 9:30 A.M.

Respectfully,

(S.) NIELS F. HERTZ,
Judge.

[File endorsement omitted]

543 IN THE SUPREME COURT OF LOUISIANA

No. 41,632

STATE OF LOUISIANA

vs.

JOHN MICHEL

Appeal from the Criminal District Court, Parish of Orleans, Section "F"—Honorable Niels F. Hertz, Judge.

OPINION—May 31, 1954

McCALEB, Justice.

On the night of February 10th 1953, appellant, a nineteen year old Negro, waylaid two fifteen year old white girls, who were returning

to grand jury panels *because the grand jury serves for six months;* and because the crime for which the grand jury may return the indictment may not have been committed until thirty or sixty days *after* the grand jury had commenced its six months term of service and, consequently, it would be physically impossible for the person so indicted to attack the grand jury panel within or "before the expiration of the third judicial day" because, as stated, the crime was not committed until thirty or sixty days after the grand jury was empanelled. Consequently, in order to make this statute applicable to a grand jury panel, our Supreme Court was compelled to rule that this statute which says, "All objections to the manner of selecting or drawing any juror or jury . . . must be filed, pleaded, heard or urged before the expiration of the third judicial day of the term for which said jury shall have been drawn. . . ." intended to say, "All objections . . . must be urged . . . before the expiration of three judicial days *after* the expiration of the term of the grand jury." Counsel for mover respectfully assert that such an interpretation is without warrant in law or reason as it deprives mover of his rights under the Fourteenth Amendment and Civil Rights Act, and that it is an unconstitutional decision.

WHEREFORE, your Defendant prays that, after due proceedings had, the verdict of the jury be set aside and a new trial ordered herein.

(Signed) GÉRARD H. SCHREIBER,
Attorney for Defendant.
GEORGE H. FUST,
Attorney for Defendant.

79 *Duly sworn to by John Joseph Michel, jurat omitted in printing.*

November 3, 1953.

Supplemental Motion for a New Trial denied.

(Signed) NIELS F. HERTZ,
Judge.

[File endorsement omitted]

IN THE CRIMINAL DISTRICT COURT, PARISH OF ORLEANS, SECTION "F"

[Title omitted]

MOTION FOR APPEAL AND ORDER THEREON—Filed November 9, 1953

And now into open Court comes the defendant, John Michel, through undersigned Counsel, and on suggesting to the Court that the record herein shows error to his prejudice and that he is de-

sirous to appeal to the Honorable The Supreme Court of the State of Louisiana.

WHEREFORE, he prays that he be granted a suspensive appeal to The Honorable the Supreme Court of the State of Louisiana, returnable in accordance with law.

(Signed) JOHN JOSEPH MICHEL.

80 GEORGE H. FUST,
Attorney for Defendant.

ORDER

Let a suspensive appeal in this case on behalf of the defendant, John Michel, to the Supreme Court of the State of Louisiana, and let the return date be the 4th day of January 1954, at 10:35 A.M. and pending said appeal let the defendant be incarcerated in the parish prison without bail.

New Orleans, Louisiana,
November 9th 1953.

(Signed) NIELS F. HERTZ,
Judge.

81 [File endorsement omitted]

IN THE CRIMINAL DISTRICT COURT, PARISH OF ORLEANS, SECTION "F"

[Title omitted]

BILL OF EXCEPTION No. 1—Filed November 3, 1953

BE IT REMEMBERED that before answering to the bill of Indictment in the above numbered and entitled cause, JOHN MICHEL on March 9th., 1953, did file a Motion to Quash the Indictment, which said Motion reads as follows:

"Motion to Quash Omitted. Printed side page 24 ante

82 BE IT FURTHER REMEMBERED that on March 23rd 1953, the State of Louisiana through the District Attorney for the Parish of Orleans, did file a Demurrer to the foregoing Motion to Quash which said Demurrer reads as follows:

"Answer and Demurrer to Motion to Quash Omitted. Printed side page 26 ante.

83-86 BE IT FURTHER REMEMBERED that on March 30th 1953, your defendant, JOHN MICHEL, did file an answer to the foregoing Demurrer of the State of Louisiana, which answer reads as follows:

"Answer to Demurrer Omitted. Printed side page 28 ante.

87 BE IT FURTHER REMEMBERED that on March 30th 1953, on motion of the defense in support of their answer to the State's Demurrer, the following testimony was taken:

Testimony Adduced on March 30th 1953 on Demurrer

GERARD H. SCHREIBER, who was sworn as a witness on motion of the defense, testified as follows:

DIRECT EXAMINATION.

Mr. FUST:

Q. Were you once connected with the district attorney's office of the city of New Orleans?

A. Yes, I was.

Q. When was that?

A. Well, I resigned in—I think, September 1st 1952. I was appointed sometime in the middle part of 1950, approximately two and one half years.

Q. That was during the term of the present district attorney?

A. Yes.

Q. What was your experience in connection with motions to quash in criminal cases; that you handled?

A. In what respect?

Q. Were there any motions to quash filed in cases during the period you were in the district attorneys office where the motions were filed sometime after the term of the grand jury which indicted those defendants expired?

A. Yes, there was.

Q. I hand you a record here in the Alfred Dowl case, number 139-324. I hand you the record in the case and ask you to tell the Court what date during the proceedings was the motion to quash filed in that case?

A. Well, the indictment shows that Alfred Dowl was indicted July 10th 1952, that was the grand jury for March 2nd 1952 through September 2nd 1952. The indictment further shows he was arraigned August 29th 1952, which was approximately one month plus nineteen days after the true bill was returned by the grand jury.

88 The COURT:

Q. That is not after the grand jury left office?

A. Yes, the grand jury would have gone out of office September 2nd 1952, I say, he was arraigned on August 29th which was one month and 19 days.

The record further shows, rather the indictment shows on September 11th 1952, the Court appointed J. L. McCain, attorney at law, to represent the defendant Albert Dowl. That was approximately seven days after that grand jury went out of office. At the time of his appointment McCain stated he would file pleadings on September 16th 1952. The record shows, the indorsements to the indictment shows that on September 16th 1952, the defendant filed a motion to quash which was fixed for argument September 29th 1952, rather fixed for trial on that date.

Mr. Fust:

Q. Did the State object to the filing of that motion to quash?

A. There is no record of it, of the State having filed a demurrer to that motion to quash.

Q. And that motion to quash was filed September 16th and the grand jury term ended on September 2nd?

A. That is correct.

Q. I will hand you the file in the case of State v. Robert Green, Jr., number 136-991. I will ask you to tell the Court what the record reflects in this matter insofar as to the stage of the proceedings at which the motion to quash was filed?

A. This record shows Robert Green was indicted August 23rd 1951. That would be the grand jury that was impaneled to serve from March 2nd 1951 through September 2nd 1951. The indorsement to the indictment shows that the defendant was arraigned September 6th 1951, which was four days after the grand jury that had indicted him their term had expired. The record shows, the indorsement to the indictment shows that on March 19th 1952, the court permitted——

89 The Court:

Q. What date?

A. March 19th 1952, which was six months plus some days after the grand jury went out of office, that on motion of counsel for defendant, that the Court ordered the plea of not guilty be withdrawn in order to file a motion to quash. In other words this record shows that motion to quash was filed six months and approximately nineteen days after the grand jury term had expired.

Mr. Fust:

Q. Does the record show whether the State through the district attorney objected to the filing of a motion to quash?

A. The record does not show any demurrer to this motion to quash.

Q. What section of the Court did that case arise in?

A. Robert Green, Section "B".

Q. What section of the Court did the Dowl case arise in?

A. Section "A".

Q. I hand you the record in the case at bar and ask you to tell the Court at what stage of the proceedings was the motion to quash filed herein?

A. This indictment shows it was returned as a true bill on February 19th 1953. That would be the grand jury that was impaneled to serve from September 2nd 1952 through March 2nd 1953, and it shows that on February 23rd 1953, the defendant was called up for arraignment, that was approximately only two judicial days after the defendant was indicted. As a matter of fact that was the second judicial day after the defendant was indicted, and the indorsement to the indictment shows the arraignment was continued to March 2nd 1953. The indorsement to the indictment shows that on February 23rd the arraignment was continued in order to grant to the defendant until March 2nd 1953 to employ counsel. The next indorsement to the indictment shows that the Court ap-

90 pointed me to represent the defendant on March 2nd 1953, that would have been on the day the term of the grand jury had expired, and set the arraignment for March 9th 1953. On March 9th 1953, the record shows that the instant motion to quash was filed.

Q. In other words the motion to quash was filed on the fifth judicial day that followed the expiration of the term of the grand jury that indicted this defendant?

A. That is correct.

Q. As a matter of fact, when did you receive your official notice of your appointment?

The Court: Before he answers that, I want to state that we discussed this appointment before he received his official appointment from the court.

Mr. Fust:

Q. When did you actually receive your official notice of appointment?

A. I received the official notice of the appointment on March 5th 1953.

Q. Had the Judge of this honorable court discussed the possibility of an appointment with you before that time?

A. Yes, that is correct.

Q. Tell us the facts surrounding the appointment?

A. Judge Hertz had discussed the case with me, not the case, but the question of me being appointed and asked me would I take the case, etc., and I told him, yes, that I would take the case, and he told me he was going to appoint an attorney or several attorneys to assist in the defense of this defendant.

Q. Was that after the defendant had been brought up for arraignment the second time?

A. I think it was the same day. As a matter of fact, I think March 2nd I was in court on another matter at the time; I was not in here to represent this defendant, I had another matter coming up. I was in court when the defendant was called and shortly after that Judge Hertz discussed my appointment with him.

91 CROSS-EXAMINATION

Mr. GULOTTA:

Q. According to your recollection when was it—when was the first time or day Judge Hertz discussed with you your appointment to represent the accused in this case?

A. I don't know the first day Mr. Gulotta, because the time was such a short period of time I can't remember the exact day. However, I do remember I was in court on March 2nd when this arraignment was called. I remember that because at that time I spoke to the boy's aunt and told her, after Judge Hertz discussed this with me, I told him yes. I remember his aunt was here and I told his aunt I would discuss it with her.

Q. In other words Judge Hertz discussed with you prior to March 2nd, your appointment?

A. He discussed it with me the appointment.

Q. Can you give me any idea about how many times it was that Judge Hertz discussed your appointment in this case?

A. I have no idea.

Q. Approximately?

A. I have no idea, as I say, I distinctly remember discussing it with him March 2nd. As to preliminary discussions taking place or anything like that, I have no idea, but there was never any appointment in this case prior to March 2nd. I would say not confirmed appointment that what I mean.

Q. In other words as I understand, your recollection is hazy as to whether or not Judge Hertz spoke to you prior to March 2nd?

The COURT: My recollection is not hazy. Do you want me to tell you?

92 Mr. GULOTTA: That's what I want, yes, sir.

The COURT: I might say I discussed the appointment with several other attorneys before discussing it with Mr. Schreiber and in view of the fact this is a capital case requiring representation by a lawyer who has five years experience at the bar I had quite some difficulty in getting a lawyer of that practice. I discussed the matter cursory with Mr. Schreiber right after the date of the first arraignment which was February 23rd. The defendant appeared in court without an attorney for arraignment and I asked him if he was going to employ counsel, informing him he was charged with an offense if convicted of, he would have to be assigned to the electric chair. He said his people were going to get a lawyer and I told him if he didn't have a lawyer the next time the case was fixed, I would appoint a lawyer for him. Some colored woman who represented herself as his aunt came to see me March 2nd. I discussed the matter with Mr. Schreiber in the meantime, in the event they did not employ a lawyer, and asked him would he be willing to represent the defendant and help the court out. On another occasion I told him I had not heard from those people and asked him would he still be willing to represent the man, I don't remember the time, that was between the first discussion and March 2nd, and told him in the event he accepted the appointment I would appoint another lawyer because the case was a capital case. I felt he was trying to help me out. On the second, he was in the courtroom and the defendant was called up and I called the aunt, this woman informed me she was unable to get a lawyer for him and I told her, very well, I would appoint Mr. Schreiber. He said, Judge, give me an opportunity to look it over and continue the matter for one week, is that correct?

93 Mr. SCHREIBER: I don't think I had that much to say. As a matter of fact I recall my sitting on the bench and you spoke to me from the bench and asked me would I accept the appointment.

The COURT TO LOUISE DESVIGNES: On the first time you spoke to me, this man came up for arraignment and I continued it for him to get a lawyer, do you remember that?

A. I do.

The second time, March 2nd 1953, you came in and told me he could get a lawyer. Did I call you up and introduce you to Mr. Schreiber and tell you, this is the lawyer I appointed?

A. Yes, sir.

The COURT: That same day March 2nd, you said to me, Judge, if you don't mind, I don't know anything about the case, would you mind continuing the arraignment to give me

an opportunity to look over the record. I said, yes one week, because I would like to try this case before my vacation.

Mr. SCHREIBER: I would have to take exception to my asking for a continuance on March 2nd.

The COURT: I continued it.

Mr. SCHREIBER: I would like to say in reference to that that I did not consider myself to be officially appointed in this case until I received official notice from the court of my appointment. As I say, up to that time the appointment was hazy, there was several attorneys to be appointed in the case, that I did not consider myself officially appointed until March 5th and that I took no action in the case until that time.

94 The COURT: I distinctly remember that I called the aunt and told her you were one of the lawyers I had appointed in the case. I remember distinctly it was March 2nd. I appointed you in the case.

GEORGE H. FUST, who was sworn as a witness on motion of the defense, testified as follows:

DIRECT EXAMINATION

Mr. SCHREIBER:

Q. State your name?
A. George H. Fust.
Q. What is your occupation?
A. Attorney.
Q. Are you one of the attorneys that has been appointed by the court to represent John Michel?
A. Yes, I am.
Q. I hand you the record in the case of State vs. John Michel, 141-241, and I ask you what does the record show with reference to your appointment?
A. The record is silent with reference to my appointment, however, I can explain the circumstances surrounding my appointment.
I walked into Judge Hertz' court on Friday March 6th on another matter and at that time Judge Hertz asked me if I would accept an appointment to represent the defendant in this case and said that he had already appointed you, Mr. Schreiber, in the same matter.

The COURT: With all due respect to you Mr. Fust, I appointed you to assist him, not to represent him.

Mr. FUST: That is correct.

95 Judge Hertz explained at that time that I was to accept that as my official appointment and that he would not go through the routine of having the clerk's office mail me a notice of my appointment.

The COURT: Could you be mistaken, was it on the 3rd?

Mr. FUST. No, sir, I could not.

Mr. GULOTTA: No questions.

Mr. SCHREIBER: In connection with the testimony of Mr. Fust, we would like to offer in evidence the indictment in the Robert Green case, 136-991, allotted to Section "B" of this Court, and the case of Alfred Dowl, 139-324, allotted to Section "A" of this court, and the indictment in the instant case of John Michel, 141-241, allotted to "F".

Mr. GULOTTA: I would like to offer also in evidence, the indorsements on the indictments you offer.

Mr. SCHREIBER: I presumed I was offering them.

The COURT: The Court will take the matter under advisement with the understanding that counsel for both sides will submit briefs and the decision will be rendered Wednesday April 8th."

96 BE IT FURTHER REMEMBERED that on April 8th 1953, the Court ruled sustaining the Demurrer of the State of Louisiana and dismissed the defendant's Motion to Quash the Indictment, to which ruling your defendant did then and there in open court, object and the same being overruled by the Court, did then and there reserve this Bill of Exceptions making part thereof the motion to quash, Demurrer and Answer to Demurrer, and the testimony taken on the answer to the Demurrer, part of this Bill of Exceptions, which Bill of exceptions your defendant now files and presents for signature.

New Orleans, Louisiana,
November 9, 1953, 9:00 A.M.

(Signed) NIELS F. HERTZ,
Judge

97 IN THE CRIMINAL DISTRICT COURT, PARISH OF ORLEANS, SECTION "F"

[Title omitted]

PER CURIAM, TO BILL OF EXCEPTION NO. 1—Filed November 9, 1953

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the State of Louisiana.

May it please the court:

I sustained the demurrer of the State of Louisiana and dismissed the motion to quash the indictment because the said motion to quash was filed more than three judicial days after the expiration of the grand jury term of the Grand Jury that indicted the defendant herein. The minute entries of this court will show that the Grand Jury that indicted the defendant herein went into office on the 2nd day of September 1952 and the term of the said Grand Jury expired on March 2nd 1953; that the motion to quash the indictment filed herein was filed on the 9th day of March 1953, more than three judicial days after the expiration of the grand jury term of the Grand Jury that indicted the defendant herein. Under the provisions of Revised Statute 14:202 "any objection to the manner of selecting or drawing a Grand Jury, any defect or irregularity in impaneling or selection of a Grand Jury, must be urged before the expiration of three judicial days after the said grand jury term expired, or before entering upon the trial of the case if it be done sooner."

This question has been previously and extensively discussed by the Supreme Court of the State of Louisiana in the case of State v. Wilson, reported in 14 So. 2d 873, where the same question was presented. In that case the trial judge sustained the de-
98 murrer filed by the State and dismissed the motion to quash as I have done in this case, and his ruling was affirmed by the Louisiana State Supreme Court.

Respectfully,

(S.) NIELS F. HERTZ,
Judge

New Orleans, Louisiana,
November 9, 1953, 9:30 A.M.

[File endorsement omitted]

99 [File endorsement omitted]

IN THE CRIMINAL DISTRICT COURT, PARISH OF ORLEANS, SECTION "F"

[Title omitted]

BILL OF EXCEPTION No. 2—Filed November 3, 1953

Annexed:

Motion to Quash, made part of and copied in Bill of Exceptions No. 1, ...

Answer and Demurrer to Motion to Quash made part of and copied in Bill of Exceptions No. 1, ...

Defendant's Answer to Demurrer, made part of and copied in Bill of Exception No. 1, ...

Testimony adduced in support of defendant's answer to State's Demurrer, made part of and copied in Bill of Exceptions No. 1, ...

BE IT REMEMBERED that before answering to the Bill of Indictment in the above numbered and entitled cause, your defendant did file a Motion to Quash the Indictment herein, which motion is copied in and made part of Bill of Exceptions No. 1, and which motion is annexed hereto and made part hereof as if set out in extenso herein.

BE IT FURTHER REMEMBERED that on March 23rd 1953, the State of Louisiana through the District Attorney, did file a Demurrer to the defendant's Motion to Quash, which Demurrer is copied in and made part of Bill of Exceptions No. 1, and which Demurrer is annexed hereto and made part hereof as if set out in extenso herein.

BE IT FURTHER REMEMBERED that on March 30th 1953, your defendant did file an Answer to the State's Demurrer, which Answer is copied in and made part of Bill of Exceptions No. 1, and which Answer is annexed hereto and made part hereof as if set out in extenso herein.

BE IT FURTHER REMEMBERED that on March 30th 1953, on motion of your defendant, testimony in support of defendant's answer to the State's Demurrer was taken, which testimony is copied in and made part of Bill of Exceptions No. 1, and which testimony is annexed hereto and made part hereof as if set out in extenso herein.

BE IT FURTHER REMEMBERED that on April 8th 1953, the
100 Court ruled, sustaining the Demurrer of the State and dismissing defendant's Motion to Quash.

BE IT FURTHER REMEMBERED that then and there your defendant did move to be allowed to present and perpetuate his evidence in support of his Motion to Quash.

BE IT FURTHER REMEMBERED that your defendant's Motion was denied, to which ruling your defendant did then and there reserve this Bill of Exceptions, making part thereof the defendant's Motion to Quash, the States Answer and Demurrer, the defendant's Answer to the States Demurrer, and the testimony in support of the defendant's Answer to the State's Demurrer, part of the bill. And there being error to the prejudice of your defendant, your defendant now files this his formal Bill of Exceptions and presents same for signature.

New Orleans, Louisiana,
November 9, 1953, 9:00 A.M.

(S.) NIELS F. HERTZ,
Judge.

101-391 IN THE CRIMINAL DISTRICT COURT, PARISH OF ORLEANS, SECTION "F"

[Title omitted]

PER CURIAM TO BILL OF EXCEPTION NO. 2—Filed November 9, 1953

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the State of Louisiana:

May it please the court:

I denied defendant's motion to perpetuate testimony in support of his motion to quash because, as stated in my per curiam to bill of exception No. 1, I denied the motion to quash because of the untimeliness of its filing. Although counsel for the defendant seems not to make it a serious issue, however, testified that he was appointed by me to represent the defendant on March 5th 1953. Such is not the case and the record will show that I appointed him to represent the defendant on March 2nd 1953, and the motion to quash was filed by him on March 9th 1953, more than three judicial days after the expiration of the grand jury term which took place on March 2nd 1953. At no time during the intervening time between March 2nd and March 9th did counsel file any motion asking for delay for the purpose of filing any special pleadings. Counsel admitted in answer to a question by me while testifying that I notified him in open court on March 2nd 1953 of the appointment (after he had informed me that he was willing to and would represent the defendant) but stated that he did not consider the appointment official until he was given a written notice from the clerk's office. As I stated previously counsel for the defendant does not seem to seriously consider this difference but nevertheless I

deem it advisable to call it to the attention of the Louisiana State Supreme Court.

New Orleans, Louisiana,
November 9, 1953, 9:30 A.M

Respectfully,

(S.) NIELS F. HERTZ,
Judge.

[File endorsement omitted]

392 [File endorsement omitted]

[Title omitted]

IN THE CRIMINAL DISTRICT COURT, PARISH OF ORLEANS, SECTION "F"

BILL OF EXCEPTION No. 40—Filed November 3, 1953

Annexed:

Motion to Quash .....
Answer to Demurrer to Motion to Quash .....
Answer to Demurrer .....
Motion to perpetuate testimony .....
Motion for Bill of Particulars .....
Pray for Oyer .....
Motion for Supplemental Bill of Particulars .....
Application for Writ of Subpoena Duces Tecum .....

BE IT REMEMBERED that after verdict in the above entitled and numbered cause, and before sentence, your defendant JOHN MICHEL, did file a motion for a new trial, which said motion reads as follows:

Motion for a New Trial Omitted.

Printed side page 68 ante

393 WHEREUPON, the Court having overruled the motion, your defendant did in open court, reserve a bill of exception, making the motion, the Court's ruling on the motion, the pleadings filed by defendant, the Court's ruling on the pleadings, and the objections urged by the defendant, the Court's ruling on the objections, the motions made by defendant, the Courts ruling on the motions in the course of the trial, and the bills of exception reserved thereon, part of the bill. And now showing that there was error to the prejudice of your defendant, in the ruling of the Court denying the motion for a new trial, your defendant presents this his bill of exception for signature.

New Orleans, Louisiana,
November 9, 1953, 9:00 A.M.

(signed) NIELS F. HERTZ,
Judge.

394 IN THE CRIMINAL DISTRICT COURT, PARISH OF ORLEANS, SECTION "F"

[Title omitted]

PER CURIAM TO BILL OF EXCEPTION No. 40—Filed November 9, 1953

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the State of Louisiana:

May it please the court:

I overruled the motion for a new trial because I believe the verdict of the jury should not be disturbed. Briefly, the facts are these: A young white girl, Estelle Schneider, age 15, accompanied by a friend of hers, Rosemary Misuraca, were walking from a bus stop on the date of the alleged crime when they were confronted by the accused John Michel, a Mulatto, who first robbed both of them of certain jewels and then later raped one of them named Estelle Schneider. The young girl during the trial identified the accused as the person that committed the attack upon her. Shortly after the commission of the alleged offense the accused was arrested and made a confession. In the confession he stated to members of the police department that he had turned the jewelry that was taken from the two girls at the time of the attack over to a friend of his by the name of Albert Pierre. Following this lead the police officers contacted Albert Pierre who readily admitted that he had the jewelry in his possession which was turned over to him by the accused and he surrendered it to the police. The said Albert Pierre later testified during the trial to that effect. He likewise identified the jewelry and also identified the accused as a friend of his of long standing. The petit jury was out a very short time and returned a verdict of "guilty as charged" which was received and recorded in the minutes of this court. I believe that the verdict should not be dis-
395 turbed, that the case as made out by the State,—the accused did not take the stand, was clear and convincing beyond a reasonable doubt of the guilt of the accused. I therefore denied the motion for a new trial filed by the accused.

New Orleans, Louisiana,
November 9, 1953, 9:30 A.M.

Respectfully,

(Signed) NIELS F. HERTZ,
Judge.

396-401 [File endorsement omitted]

IN THE CRIMINAL DISTRICT COURT, PARISH OF ORLEANS, SECTION "F"

[Title omitted]

BILL OF EXCEPTION No. 41—Filed November 8, 1953

Annexed:

Motion to Quash .....
Demurrer to Motion to Quash .....
Defendant's answer to Demurrer .....
Supplemental Motion for New Trial .....

BE IT REMEMBERED that on the trial of the above entitled and numbered cause, and before sentence, your defendant filed with the Court, the following Supplemental Motion for a New Trial:

Supplemental Motion for a New Trial Omitted.

Printed side page 72 ante

402 WHEREUPON, the Court having overruled the motion, your defendant did in open court object to same, and his objection having been overruled, did reserve a bill of exceptions, making the motion to quash, the demurrer of the State, and the defendant's answer to the demurrer, the supplemental motion for a new trial and the ruling of the Court thereon, part of the bill. And now showing that there was error to the prejudice of your defendant in the ruling of the court, your defendant presents this his bill of exceptions for signature.

New Orleans, Louisiana,
November 9, 1953, 9:00 A.M.

(Signed) NIELS F. HERTZ,
Judge.

to their homes in New Orleans after witnessing a carnival parade, and, while holding them captive with an open blade knife, robbed them of their meagre possessions, a wrist watch, two rings and a gold cross. After taking this jewelry, he released one of the girls but commanded the other to walk with him to a nearby secluded spot in the area of St. Bernard Avenue, where he forced her, by threats against her life, to perform an unspeakable and degrading carnal act upon his person and thereafter proceeded to rape her three times. He was indicted for aggravated rape on February 13th 1953 and subsequently was tried and convicted of the offense, being sentenced to death by electrocution. He is appealing from his conviction and sentence, relying on 42 bills of exceptions for a reversal.

The first and second bills of exceptions may be considered together, as the complaint in the second is dependent upon whether the first bill is well founded. That bill was reserved to a ruling of the trial judge denying a motion to quash the indictment. In his motion, appellant challenged the validity of the indictment, contending that negroes had been systematically excluded from the general venire from which the Grand Jury returning the indict-
544 ment was selected, in violation of the rights guaranteed to him by the Federal and State Constitutions. The State demurred to the motion to quash on the ground that it had not been filed within the time prescribed by law. The judge sustained the demurrer holding that, since the motion to quash had not been filed within three judicial days from the expiration of the term of the Grand Jury, which had returned the indictment, it could not be considered in view of the provisions of Article 202 of the Code of Criminal Procedure, as interpreted by this court in State vs. Wilson, 204 La. 24, 14 So. (2d) 873.

The record shows that the Grand Jury that indicted appellant was impanelled on September 2nd 1952 and that its term expired on March 2nd 1953. Appellant's motion to quash was filed on March 9th 1953, seven days after the term of the Grand Jury ended.

Article 202 of the Code of Criminal Procedure (now R. S. 15:202) provides:

> "All objections to the manner of selecting or drawing any juror or jury or to any defect or irregularity that can be pleaded against any array or venire must be filed, pleaded, heard or urged *before the expiration of the third judicial day of the term for which said jury shall have been drawn*, or before entering upon the trial of the case if it be begun sooner; otherwise, all such objections shall be considered as waived and shall not afterwards be urged or heard." (Emphasis ours.)

In State vs. Wilson, supra, the court was called upon to construe the foregoing provision—precisely, to ferret out the meaning in-

15.

That petitioner was indicted February 19, 1953 and, consequently, petitioner could not attack the grand jury venire or array "Within the third judicial day of the term for which said grand jury was drawn;" that any attempt made by Your Honors to apply this statute to the Grand Jury is an attempt to do the impossible and, if persisted in, must necessarily result in making the statute declare something which the statute does not declare.

16.

That petitioner emphatically asserts that he has the utmost respect for the wisdom and integrity and good faith of Your Honors and makes the assertions herein in what he considers a fair and reasonable discussion of a point of law, and with all proper deference.

17.

Petitioner points to the decision of Your Honors in the case of State vs. Wilson, 204 La. 24, 14 So. (2nd) 873, in which matter Your Honors were called upon to interpret and apply said statute R. S. 15:202, cited above, in a Motion to Quash an indictment, and to the fact that immediately notable about said Wilson decision is its great length and effort and, secondly, the dissent of the then Chief Justice of the Louisiana Supreme Court, completely and categorically disagreeing with the majority opinion; and to the fact that the trial court, in the instant case, in sustaining the Answer and Demurrer to Motion to Quash filed by the State made said ruling upon the authority of said State vs. Wilson.

18.

Petitioner further points out that Your Honors in affirming the said ruling of the trial court did so upon the authority and precedent of said State vs. Wilson and the interpretation of said statute in said case.

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19.

The petitioner submits that the Court is in error in interpreting R. S. 15:202 as it did in the Wilson case and in the instant case.

20.

That such an interpretation completely and essentially changes said statute and makes it say something it does not say, and that such an interpretation is an unconstitutional exercise of judicial

tended by the Legislature in its use of the above italicised language, that objections to the selection or composition of juries or venires must be urged "before the expiration of the third judicial day" of the jury term. After an exhaustive review of the history of the prior laws on the subject and a painstaking and comprehensive discussion of the language of the Article, it was concluded that, in order that the provision might be applied with fairness and consistency in all cases, the Legislature intended that anyone desiring to challenge the array or selection of any jury was required to urge his objection before the expiration of the third judicial day *following* the term for which the jury had been drawn, or before entering upon the trial of the case if it be begun sooner.

545 Counsel for appellant assail the Wilson decision, proclaiming that the interpretation there given to R.S. 15:202 is unsound when applied to the facts of this case and that it should be overruled. Alternatively, they suggest that, at all events, the decision does not control the special situation presented here and should be differentiated.

We do not find it necessary to review in detail the basis of the ruling in the Wilson case. Suffice it to say that we think that it represents a correct analysis of the intention the Legislature was attempting to express in the writing of the statute and that, under this interpretation of the language, a *reasonable time is provided to all persons charged with crime within which to file whatever objections they may have to the method of selecting any jury or venire.* Moreover, it is evident that the Legislature has since approved of the construction given to Article 202 of the Code of Criminal Procedure by this court in the Wilson case, which was decided in 1943, as it incorporated the Article without change in the Revised Statutes of 1950.

However, counsel insist that the statute as interpreted in the Wilson case is unfair, if applied to the facts of this matter, as they claim that they were not appointed to defend appellant until more than three days after the expiration of the jury term had elapsed — thus, depriving them of asserting on appellant's behalf his right to an equal protection of the law.

There might have been merit in this postulation if the predicate upon which it is based was supported by the record. But the minutes of the Court show that appellant's chief counsel, Mr. Gerard H. Schreiber, an attorney of experience in criminal cases, was appointed by the judge to represent him on March 2nd 1953 (not on March 5th, as counsel contends and this is verified by the per curiam of the judge. It is true that the other counsel, also an experienced criminal lawyer, was appointed on March 6th 1953, but this is of no importance as appellant was already represented by an attorney. See State vs. Wilson, supra. Hence, since appellant had the benefit

power because it is an act of legislation and not an act of judicial interpretation.

21.

That any statute which deprives a defendant, arbitrarily and unreasonably, of an opportunity to prove facts which would amount to a prima facie case of systematic exclusion of colored persons because of their color from the Grand Jury which indicted him, is unconstitutional and in violation of the Fourteenth Amendment to the Constitution of the United States, and of the Constitution of the State of Louisiana, Article 1, Section 9, which guarantees unto all defendants the right to a public trial by an impartial jury and, in capital cases, the guarantee of not to be held for answer to said crime unless on a presentment or indictment by a grand jury which, it necessarily follows, must also be an impartial one.

22.

That the interpretation placed upon R.S. 15:202 deprived petitioner of his right to file his motion to quash the indictment as guaranteed or provided in R.S. 15:284, and of his right to have his said motion to quash filed, tried and disposed of before trial on the merits, as provided in R.S. 15:287.

Petitioner further shows that a rehearing should be granted and, finally, the judgment of the District Court should be reversed and set aside.

The premises considered, petitioner prays that, after due consideration, a rehearing be granted in this case; and that, finally, the judgment of the District Court be avoided and reversed, and judgment rendered in favor of petitioner herein granting unto petitioner a new trial; and for all general and equitable relief, etc.

Attorneys for Petitioner

REHEARING REFUSED—July 2, 1954

of counsel on March 2nd 1953, the same day that the Grand Jury term ended, his contention, that it is unreasonable to apply the prescription of the law in this case, falls of its own weight, as his counsel had ample time, three judicial days from the date of
546 his appointment, to have filed the motion to quash the indictment.

Our ruling that the judge was correct in sustaining the State's demurrer to the motion to quash the indictment effectually disposes of Bill of Exceptions No. 2, which was taken to the overruling of appellant's motion to perpetuate testimony in support of the motion to quash.

Appellant, having been indicted for aggravated rape under the short form provided by Article 235 of the Code of Criminal Procedure (R. S. 15:235), availed himself of the provisions thereof by requesting the State to furnish a bill of particulars. In a supplemental motion, he asked that he be advised (a) of the particular type of aggravated rape on which the prosecution was based; (b) if any force was used and the type of force and (c) if any threats were made and the type of threats.

The State answered that the prosecution was founded on paragraphs (1) and (2) of R. S. 14:42, in that the victim had resisted the act to the utmost but that her resistance was overcome by force and, particularly, in that she was prevented from resisting the act by threats of great bodily harm accompanied by the apparent power of execution. Pleading that its answer should be deemed good and sufficient, the State set forth that it should not be ordered to give the additional information requested by appellant, respecting the type of threats or force used by him, as this pertained to the details of the evidence which it was not required by law to furnish in advance of the trial.

When the court ruled that the information given by the State was adequate, counsel for appellant reserved Bill of Exceptions No. 3 and, we understand from their brief, that they now profess that the failure of the judge to coerce the State to give all requested particulars deprived appellant of the right guaranteed him by Section 10 of Article 1 of our Constitution, that the accused in criminal prosecutions shall be informed of the nature and cause of the accusation against him.

There is not merit in the bill. It has been held many times by this court that the short forms prescribed by R. S. 15:235
547 are not violative of Section 10 of Article 1 of the Constitution in instances where they inform the accused of the nature and cause of the accusation. State vs. Wright, 215 La. 529, 41 So. (2d) 76 and cases there cited and State vs. Roshto, 222 La. 187, 62 So. (2d) 268. This is certainly true of the short form indictment for aggravated rape. In this case, the bill of particulars furnished

by the State gave appellant all of the information necessary for his counsel to properly defend him and the judge correctly ruled that the particulars withheld pertained solely to the nature of the evidence to which appellant was not entitled: State vs. Pye, 214 La. 606, 38 So. (2d) 359.

Bill of Exceptions No. 4 was reserved to the sustaining of the State's challenge for cause of a prospective juror, a Mr. Ford, based on his statement that, while he did not object to capital punishment, he did not feel that he wanted " * * * to be one of those responsible for rendering a verdict in this case."

There is no substance in the bill for, even if it be assumed that the ruling was incorrect (which it was not), appellant is not in a position to complain inasmuch as the minutes show that the State used only eight of the twelve peremptory challenges allowed to it by law. Under the provisions of Article 353 of the Code of Criminal Procedure (now R. S. 15:353), a defendant suffers no prejudice from the sustaining of a challenge for cause "unless the effect of such ruling is the exercise by the prosecution of more peremptory challenges than it is entitled to by law. * * *." See also State vs. Thomas, 41 La. Ann. 1088, 6 So. 803 and State vs. Jackson, 42 La. Ann. 1170, 8 So. 297.

Bill of Exceptions No. 5 was taken to the allowance by the judge of peremptory challenges made by the State to two prospective jurors after they had been examined on their voir dire both by the prosecution and counsel for appellant and accepted by the latter.

That the practice complained of is permissible under the law is recognized by a long list of authorities. See State vs. Ussery, 178 La. 593, 152 So. 302; State vs. Thornhill, 188 La. 762, 173 So. 343; State vs. Ezell, 189 La. 151, 179 So. 64; State vs. Boone, 194 La. 977, 195 So. 511 and State vs. Henry, 97 La. 999, 3 So. (2d) 104. Moreover, R. S. 15:358 vests in the judge absolute discretion, not
548 subject to review, " * * * to allow either side to peremptorily challenge jurors up to the time that the jury is impanelled."

Counsel for appellant took Bill of Exceptions No. 6 to the action of the trial judge in ordering that prospective jurors be called in groups of six instead of in groups of three.

We fail to see how appellant was injured by this action. The manner of selecting a jury rests within the sound discretion of the trial judge and, as long as the accused is afforded the opportunity to examine each prospective juror with respect to his qualifications and to exercise his right of challenge, he has no reason to complain. State vs. Roberson, 157 La. 974, 103 So. 283.

Bill No. 7 was taken to the overruling of appellant's objection to a statement made by the district attorney to a group of prospective jurors in examining them on their voire dire. The district attorney, in rebuttal of certain statements made by defense counsel

concerning the effect of evidence of good character, remarked to the jurors that evidence of good character would be of no avail to appellant if the State proved to their satisfaction his guilt beyond a reasonable doubt.

There is no substance in the bill. The challenged remark is a correct statement of the law which is that; whereas evidence of good character of an accused is always admissible in his behalf, it must be considered in connection with and as a part of the whole testimony " * * * but it cannot destroy conclusive evidence of guilt". R.S. 15:480. See also State vs. Simon, 131 La. 520, 59 So. 975. The judge informs us in his per curiam that he instructed the jury on the question of character evidence in accordance with the foregoing rule of law.

While one of defense counsel was propounding questions to a group of prospective jurors, he stated that drunkenness was a defense to the crime for which appellant was on trial. The district attorney objected to the remark, and when the judge sustained the objection, counsel reserved Bill No. 8. It is claimed that this was an erroneous ruling as subsection 2 of R.S. 14:15 provides that intoxication is a defense to crimes requiring specific criminal intent and that aggravated rape is such a crime.

549 The bill is not well founded. Specific criminal intent, which is defined by R.S. 14:10, is not a necessary element of the offense of aggravated rape. The case of State vs. Ferrand, 210 La. 394, 27 So. (2d) 174, relied on by defense counsel, is not in point. There, the court held that specific intent was an element of the crime of attempted aggravated rape. This ruling was based on the sound premise that all attempts, as defined by R.S. 14:27, require specific intent.

Bill No. 9 was reserved when the judge sustained an objection of the district attorney to defense counsel repeatedly referring to appellant in the presence of the prospective jurors as "this boy".

The judge, in his per curiam, states that he maintained the objection because he did not consider the accused, who was nineteen years of age, to be a boy and he further observes that it was impossible for him to believe that appellant was prejudiced by the ruling as the petit jury was instructed to concern themselves only with the evidence heard in the courtroom and the law, as given to them by the court, in determining the guilt or innocence of appellant.

We do not regard the matter upon which this bill is predicated to be of any importance. It is manifest, even if we assumed that the ruling of the judge was incorrect in depriving counsel of referring to appellant as a boy, the error would not be of such a prejudicial nature as to warrant a reversal of the conviction. R.S. 15:557.

Bill of Exceptions No. 10 was reserved to the overruling of defense counsel's objection to the following statement, which was addressed

by the district attorney to a group of prospective jurors on their voir dire:

> "If the prosecuting witness in this case is a girl of about fifteen or sixteen years of age, the defendant at the bar is eighteen or nineteen years of age, the mere fact that this defendant is eighteen or nineteen years of age, would that influence you in arriving at a verdict in this case?"

Counsel take the position that the ages of the victim and appellant were most important and that the question directed by the district attorney was an attempt on his part to commit the jurors not to consider this very relevant factor.

We do not believe that the conclusion drawn by counsel anent the district attorney's motives is justified. In our opinion the question was perfectly proper; it was propounded to ascertain the state of mind of the prospective jurors so as to determine whether
550 they stood indifferent between the prosecution and the appellant, irrespective of the ages of the parties involved.

Bill of Exceptions No. 11 was taken to the action of the trial judge in sustaining the State's objection to the issuance of a writ of subpoena duces tecum applied for by appellant for the production of the records, from February 11th through February 17th 1953, of six District Police Stations, those of the Juvenile Division and the Show-Up Room of the Police Department, for the stated purpose of proving that appellant was incarcerated in several district police stations after his arrest and that numerous other men were being held at that time on suspicion for the same crime.

The ruling complained of is correct. To begin with, the records sought to be subpoenaed were not material, as they were wholly without bearing on the question of the guilt or innocence of appellant. Moreover, if we assume that they were public records, they were clearly excepted from the provisions of the Public Records Act, (R.S. 44: 1, 2, 3) and appellant was not entitled to their inspection until they were used in open court. See State vs. Dallao, 187 La. 392, 175 So. 4 and State vs. Mattio, 212 La. 284, 31 So. (2d) 801

In his opening statement to the jury, the district attorney related in sequence the events that took place on the night of the crime, that is, appellant's robbery, his forcing his victim to commit a crime against nature, and the three acts of rape which followed. Defense counsel objected to the statement, insofar as it referred to the crimes other than the acts of rape for which appellant was charged, on the ground that those crimes were not properly within the scope of an opening statement and should not be included therein. When the judge overruled the objections, counsel reserved Bills Nos. 12, 13 and 14.

There is no merit whatever in these bills. It would have been impossible for the district attorney to have made a clear statement of the offense without including therein a recital of all acts done and the other crimes committed by appellant, as they were part and parcel of one continuous transaction. Obviously, they constituted part of the res gestae and were admissible as original evidence. State vs. Sears, 217 La. 47, 46 So. (2d) 34 and cases there cited. This being so, it was not improper for the district attorney to mention them in his opening statement.

551 While the victim was on the stand, she was asked the question "Was that the little girl with you on the night of the alleged rape and ravishment?" to which she answered "Yes". Defense counsel thereupon objected to the use of the word "ravishment". The judge sustained the objection and instructed the jury to disregard that word. Counsel then moved for a mistrial and, when it was denied, bill No. 15 was reserved.

The complaint is shallow. It appears to us that the judge was overly cautious in sustaining the objection of counsel as the word "ravishment" is nothing more than a synonym of rape but, in any event, we are at a loss to understand the theory upon which counsel conceive that appellant was entitled to a mistrial.

During the examination of the victim on the stand, she was asked "While you were on your stomach, please state to the court and jury just what the defendant did?" Defense counsel objected and, when overruled, reserved Bill No. 16. Thereupon, the victim answered "He tried to enter me from the back". Counsel then moved for a mistrial on the ground that the district attorney had not mentioned this fact in his opening statement. When the judge denied the motion Bill No. 17 was taken.

These bills are clearly without merit. Counsel do not advance any reason for the objection to the question concerning appellant's action after he had forced the victim to lie on her stomach and we can think of none. And the basis for the motion for the mistrial, because of the answer given by the victim, is purely captious aside from being in utter contradiction to the position taken by counsel with respect to Bills Nos. 12, 13 and 14.

Bill No. 18 is in the same category. The district attorney asked the victim whether appellant said he "liked white skin". When she answered "Yes", counsel moved for a mistrial which motion was overruled. We cannot imagine why counsel think that it was improper for the victim to relate a statement given by appellant, which unquestionably formed part of the res gestae.

This observation likewise applies to Bill No. 19 which was taken to the question propounded by the judge to the victim as to what clothes she had on at the time she left the scene of the crime.

552 When the victim was on the stand, she was asked whether she had ever had sexual intercourse before the night on

which the crime was perpetrated. Defense counsel objected and the judge first overruled the objection but, before the question could be answered, he changed his mind and sustained it. Counsel then moved for a mistrial, which was refused. Bill No. 20 was then reserved.

It is now argued that the judge should have instructed the jury to disregard the question and his failure to do so constitutes reversible error.

There is no substance in the argument. We know of no law requiring the judge, on his own volition, to instruct the jury to disregard a question to which an objection has been sustained. Conversely, the burden is on defense counsel to request such an instruction if he feels that the improper question might be damaging to the accused.

Bill No. 21 was taken to the overruling of an objection to the admission in evidence of the purse and its contents carried by the victim on the night of the crime.

It is to be conceded that these articles, though probably admissible a part of the res gestae, had little evidentiary value. This being so, it is difficult to perceive that appellant was harmed by their reception. Counsel say, however, that appellant might have been prejudiced because the purse contained numerous pictures of young girls, dressed in the uniform of the parochial school which the victim attended. We regard this as a matter of no consequence.

During the course of the trial the district attorney tendered for admission two pictures of appellant, in company with other negro males, which had been taken by Mr. John T. Dahmun, a member of the Bertillion Office of the New Orleans Police Department, stating that they were offered in connection with the testimony of Dahmun and the victim. Counsel for appellant objected on the ground that the pictures had not been properly identified by the victim and that they had not been taken in her presence. When the objection was overruled, Bill No. 22 was reserved.

The bill is without merit. The trial judge states in his per curiam that the pictures were satisfactorily identified by Mr. Dahmun, who took them, prior to their introduction. This is all that was necessary.

553 Bill No. 23 is also without merit. It was taken to a question directed to the Coroner, while he was on the witness stand, as to whether the vaginal examination of the victim revealed "fresh" bleeding. The basis of the objection was that the district attorney, in his opening statement to the jury, quoted the coroner as reporting that the vaginal examination revealed "frank" bleeding.

The trial judge correctly stated in his per curiam that he did not consider the difference between "frank" and "fresh" bleeding to be

of such a nature as to exclude the evidence from the record. As a matter of fact, the word "frank," which means open or free, is practically the same as "fresh" when applied to bleeding. See Webster's New International Dictionary (2nd Ed.).

In corroboration of the testimony of the victim, the State offered in evidence several "ecochrome" photographs of her which had been taken on the morning after the commission of the offense. Counsel objected and, when overruled, reserved Bill No. 24. Thereafter, the State requested that the pictures be exhibited in a dark room connected with the Coroner's office. Counsel objected, reserving Bill No. 25 to the overruling of the objection and, prior to the exhibiting of the pictures, moved for a mistrial on the ground that the exhibition constituted an invasion of appellant's constitutional rights. The motion was overruled and Bill No. 26 was taken.

There is no merit in any of these bills. The judge states in his per curiam that the photographs were properly identified before their introduction. They were clearly admissible in support of the State's case; they were taken on the morning after the crime and revealed numerous bruises on the body of the victim. Their exhibition to the jury in a dark room of the Coroner's office was within the sound discretion of the judge. We fail to see that the judge abused his power or how any constitutional right of appellant was invaded.

After the jury had returned to the courtroom following the showing of the color pictures in the Coroner's office, defense counsel filed another motion for a mistrial on the ground that the Deputy Sheriff, who had the defendant in charge during the exhibition, had
554 held him in a degrading manner. The judge overruled the motion, stating that he found nothing degrading about the way the Deputy Sheriff handled appellant, whereupon counsel reserved Bill No. 28 and, in argument here, takes issue with the judge on this point.

It is enough to say, in answer to this bill, that we are bound by the per curiam of the judge, in the absence of clear evidence to the contrary, and cannot accept counsel's version of the occurrence.

When one Patrick Natal was testifying for the State, the district attorney offered him a written statement, which he had previously given, for the purpose of refreshing his memory. Defense counsel immediately objected on the ground that this was in the nature of a leading question. When overruled, Bill No. 28 was reserved.

This bill is unsubstantial. The district attorney plainly had the right to show the witness his prior written statement for the purpose of having him refresh his memory.

While Mr. Natal was on the stand, he was asked by the district attorney whether the victim had told him by whom she had been raped. Defense counsel objected and the court then stated that the question had already been answered so there was nothing to rule on.

Counsel thereupon took issue with the judge, stating that he did not think that the question had been answered. The court consulted the stenographer, but he said that he did not have an answer to the question in the record. The judge then asked the witness whether he had answered the question. The witness replied that he believed he said "back there" and the judge told him "you said something else, what was it?" to which the witness replied "No, sir." At this point, the court addressed the members of the jury, asking them whether there had been an answer, to which several of the jurors replied that the witness had said "It might have been a negro." Whereupon defense counsel moved for a mistrial and, upon being overruled, reserved Bill No. 29.

Counsel argue that the action of the judge constituted a comment on the evidence but we do not so view it. The judge, having heard the question answered, was merely endeavoring to ascertain whether it had also been heard by the other persons participating in the trial; inasmuch as defense counsel had denied the basis upon which the ruling on the objection had been predicated. True enough, the answer had not been heard by the stenographer and the witness himself was apparently reluctant to repeat what he had stated, but the fact remained that the members of the jury heard it and repeated it to the judge. Obviously, this was not a comment by the judge on the evidence—the most that can be said is that it was an expression by him of an opinion that a certain question had been answered. At all events, we fail to perceive that any substantial right of appellant was violated or that he suffered any harm as a consequence of the episode.

Bill No. 30 was taken to the overruling of another motion for a mistrial and is based on the charge that the district attorney was guilty of unfair tactics in that he deliberately attempted to lead a police officer, testifying for the state, so as to have him identify certain underwear as that found by him in the home of appellant.

We find no merit in the bill for the simple reason, apart from any other, that the police officer, Captain William A. Walker, was unable to identify the underwear as that taken by him from appellant's home. Consequently, it is difficult to conceive how defendant was prejudiced.

Bill No. 31 was reserved to the admission in evidence of an envelope bearing appellant's name and address which was in his possession at the time he was arrested. The basis for the objection was that it was irrelevant and immaterial. Assuming that this is true, its admission certainly cannot be viewed as a cause for reversal. Article 557, Code of Criminal Procedure (R.S. 15:557).

Bill No. 32 was taken to the overruling of counsel's objection to the admission in evidence of certain rings and other jewelry which had been taken from the young girls by appellant in the robbery.

which preceded the rape. The basis of the objection was that the proper foundation for the admission of the articles was not laid and that they were not adequately identified. The judge, in his per curiam, takes issue with this contention and shows that the articles were satisfactorily identified, detailing the persons making the identification and the substance of their testimony. Hence, there is no merit in the bill.

Bills Nos. 33, 34, 35 and 36 all relate to the alleged error of the court in admitting appellant's confession in evidence. Our law
556 provides that, before any confession can be received, the State is required to affirmatively prove that it was freely and voluntarily given and not made under the influence of fear, duress, intimidation, menaces, threats, inducements or promises. Articles 451 and 452, Code of Criminal Procedure (R.S. 15:451, 452) and Section 11 of Article 1 of the Constitution of 1921. And, it is established by the jurisprudence that, before what purports to be a confession can be introduced in evidence, it must be shown by proof which convinces beyond a reasonable doubt that it was voluntary. State vs. Green, 221 La. 713, 60 So. (2d) 208 and authorities there cited.

Appellant was arrested on February 11th 1953 and he made a written confession on February 13th. During the two days he was in custody prior to making the statement, he was in contact with 15 different police officers. All of these officers were placed on the witness stand by the State and each testified unequivocally that no threats or promises were made to appellant to induce him to confess and that the statement he gave was free and voluntary. These witnesses were vigorously cross-examined by defense counsel and they stated, in detail, the facts and circumstances surrounding the giving of the statement. A reading of their testimony fully supports the conclusion of the voluntariness of the confession which was only given after appellant was positively identified by the victim of the rape and her companion of the ill fated night.

Appellant maintains in his testimony that he was under duress when he gave the statement; that he had been jostled around by the officers, being generally subjected to ill treatment and that he was burned on the hand by one of the officers, whom he was unable to identify. Insofar as this alleged burn is concerned, the State showed that he at no time made complaint to the Coroner or anyone else.

After considering the entire evidence, we agree with the trial judge that the State has sustained the burden placed upon it of establishing affirmatively and beyond a reasonable doubt that the confession was free and voluntary.

Bills Nos. 37 and 39 refer to the same matter and may be considered together. They were taken to the refusal of the trial judge of

special charges Nos. 6 and 8 tendered by counsel for appel-
557 lant. By these special charges, counsel sought to have the court instruct the jury that specific intent constituted one of the elements of the crime of aggravated rape and, if for any reason it was not proved the jury would be required to acquit appellant.

We have heretofore pointed out, in discussing Bill of Exceptions No. 8, that specific intent is not a necessary ingredient of the crime of rape, which is defined to be the act of sexual intercourse with a female person, not the wife of the offender, "committed without her lawful consent". R.S. 14:41. The judge was, therefore, correct in refusing the special charges.

Bill No. 38 was taken to the refusal of a special charge submitted by counsel for appellant reading as follows: "I charge you that either the State or the Defense has a right to attack any statement, confession or admission introduced in evidence by introducing other evidence to contradict all or a part of said statement, admission or confession. However, I further charge you that every part of every statement, admission or confession that is not contradicted binds him who introduces it."

The judge states in his per curiam that he refused this charge as being inapplicable to the case forasmuch as no such condition existed nor was there any evidence introduced to which the charge could possibly apply.

In submitting this Bill of Exceptions, counsel do not attempt to show its pertinence to the case. At best, the charge, as framed, is somewhat incongruous. Under these circumstances, the judge's ruling was correct. See Article 390, Code of Criminal Procedure (R.S. 15:390).

Bills of Exceptions Nos. 40, 41 and 42 were taken to the overruling of two motions for a new trial and a motion in arrest of judgment. The motions for a new trial aver, among other things, that the verdict is contrary to the law and the evidence, which presents nothing for review, and further reiterate the alleged errors which we have already discussed and on which we have heretofore ruled.

The motion in arrest of judgment, being likewise predicated on errors of which we have disposed and which are said appear on the face of the record, presents nothing new for consideration.

The conviction and sentence are affirmed.

558 IN SUPREME COURT OF THE STATE OF LOUISIANA

[Title omitted]

APPLICATION FOR REHEARING

The petition of John Michel, defendant and appellant, respectfully represents:

That the opinion and decree rendered in this cause on the 31st day of May, 1954, is erroneous and contrary to the law and evidence, and prejudical to the interest of petitioner, and that a rehearing should be granted in this matter, for the following reasons, to wit:

1.

Petitioner, John Michel, a colored man, was indicted in the Parish of Orleans, State of Louisiana, for the crime of Aggravated Rape upon a certain white female; and on said indictment he was convicted and sentenced to death.

2.

In the Parish of Orleans where some thirty-two (32%) percent or some 227,000 of the total population are colored persons, where there are two colored universities, one colored hospital, corporate and unincorporated businesses owned and operated exclusively by colored persons, colored physicians, colored nurses, colored pharmacists, colored lawyers; and some nine hundred colored school teachers in the school system of New Orleans, no colored person, within the memory of any living person, with the single exception to be noted immediately hereinafter, has ever served on the Grand Jury of the Parish of Orleans, including the Grand Jury that indicted your petitioner.

3.

The single exception in which one colored person served on a Grand Jury in Orleans Parish was in the year 1936 when one R. J. Walker, a colored person who appeared to be a white person was selected for Grand Jury service by the then judge of Section "E" of the Criminal District Court, Parish of Orleans, because the judge mistook him, the said Walker, for a white man and selected him as a Grand Juror because he, the judge, thought that the said Walker was a white man.

4.

That the above allegations are allegations of public facts and publicly known facts in the Parish of Orleans, and facts which have been judicially established in State vs. Alfred Dowells, No. 139,324 and State vs. Green, No. ——— of the docket of the Criminal District Court for the Parish of Orleans; that Your Honors are cognizant of the fact that the Supreme Court

of the United States has repeatedly and consistently re-affirmed that the facts set forth in the above allegations constitute a prima facie case of intentional and systematic discrimination against colored citizens because of their color in the selection of grand jurors by those officers whose duty it is to select grand jurors, and that grand juries so selected are selected in violation of the Fourteenth Amendment of the Constitution of the United States and of the Civil Rights Act enacted by Congress under the authority of said Fourteenth Amendment, and that indictments returned by such grand juries against colored persons cannot stand.

5.

Louisiana Revised Statutes of 1950, Title 14, Article 42, creates and defines the crime of Aggravated Rape and provides the death penalty therefor. The Constitution of Louisiana, Article 1, Section 9, provides: " . . . no person shall be held to answer for capital crime unless on a presentment or indictment by a grand jury . . . "

6.

The inevitable all-white and then current Grand Jury of the Parish of Orleans indicted petitioner on February 19, 1953 for the said crime of aggravated rape on a certain white female. The date of the alleged crime in the indictment is February 10, 1953.

7.

On March 9, 1953, before arraignment on said indictment in the trial court, petitioner filed a motion to quash said indictment because the grand jury which returned said indictment was selected in violation of petitioner's right to the equal protection of the laws as guaranteed by the Constitution of the United States. That considering the colored population of the Parish of Orleans and the fact that no colored person ever served on a Grand Jury in the Parish of Orleans, with the exception already noted, that there was an unlawful, systematic and unconstitutional exclusion of colored persons from Grand Juries. That the motion to quash filed by petitioner speaks for itself for the substance thereof and for the purpose of establishing the fact that the Federal constitutional issue was timely and unequivocally raised in the trial court at the very inception of this prosecution.

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8.

On March 23, 1953, the State of Louisiana through the District Attorney for the Parish of Orleans filed an Answer and Demurrer to the Motion to Quash, that is, an answer to the Motion to Quash filed by your petitioner; this Answer and Demurrer to

the Motion to Quash was sustained by the trial court and petitioner by said ruling was thereupon and thereby cut off and deprived of the opportunity to make legal proof of the details which are alleged in the first four articles of this petition, and which constitute prima facie proof of the intentional and systematic exclusion of colored persons because of their color from the Grand Jury which indicted petitioner, in violation of the Fourteenth Amendment to the Constitution of the United States. A bill of exception was timely and properly reserved to this ruling of the trial court.

9.

Before the trial court made its ruling, which petitioner claims was adverse and illegal, petitioner filed in the record an Answer to Demurrer, and calls Your Honor's attention to the contents of his Answer to Demurrer which sets out, among other things, the details of population, etc., which petitioner was attempting to make legal proof of to show that in fact and prima facie the Grand Jury which indicted petitioner was selected in violation of the Fourteenth Amendment to the Constitution of the United States and the Civil Rights Act enacted by Congress under the authority of said Amendment.

10.

Petitioners Answer to the Demurrer is further important because it is added proof of the fact that petitioner timely and properly in the trial court and at the very inception of this prosecution raised the Federal question and issue involved.

11.

Your Honors sustained the ruling of the trial court, and this brings petitioner to the crux of this petition. Revised Statutes of Louisiana, 1950, Title 15, Article 202, reads as follows:

> "All objections to the manner of selecting or drawing any juror or jury or to any defect or irregularity that can be pleaded against any array or venire must be filed, pleaded, heard or urged before the expiration of the third judicial day of the term for which said jury shall have been drawn, or before entering upon the trial of the case if it be begun sooner; otherwise all such objections shall be considered as waived and shall not afterwards be urged or heard.

561 12.

Petitioner respectfully requests Your Honors to note the following words and language of said statute: "All objections . . . must be filed . . . before the expiration of the third

judicial day OF THE TERM FOR WHICH SAID JURY SHALL HAVE BEEN DRAWN . . ." Respectfully, the words and language of said statute are common, simple, every day English words with a meaning that is easily, readily and unmistakably understood by all English speaking peoples throughout the world. "THE THIRD JUDICIAL DAY OF THE TERM FOR WHICH SAID JURY SHALL HAVE BEEN DRAWN" means "THE THIRD JUDICIAL DAY OF THE TERM FOR WHICH SAID JURY SHALL HAVE BEEN DRAWN."

The first judicial day of the term for which the jury is drawn means the first judicial day of their term of service as jurors.

The second judicial day of the term for which the jury is drawn is the second judicial day of their term of service as jurors.

The third judicial day of the term for which said jurors are drawn is the third judicial day of their term of service as jurors.

Petitioner respectfully asserts that the judicial interpretation of this language of this statute which judicial interpretation says that where a grand jury is involved that "THE THIRD JUDICIAL DAY OF THE TERM FOR WHICH THE GRAND JURY IS DRAWN" means "BEFORE THE THIRD JUDICIAL DAY AFTER THE TERM OF SERVICE OF THE GRAND JURY HAS EXPIRED", with all deference and proper respect to Your Honors, is an arbitrary and unreasonable interpretation of the language of this statute; that it is an interpretation that completely and essentially changes said statute and makes said statute say something that the statute does not say; and that such an interpretation is an unconstitutional exercise of judicial power because IT IS AN ACT OF LEGISLATION and not an act of judicial interpretation.

13.

Petitioner respectfully suggests that there is ONE and ONLY ONE REASONABLE INTERPRETATION OF THE LANGUAGE of said statute and that is to declare that the legislature in enacting this statute had in mind and intended this statute to apply only to petit jury venires and petit jury arrays because this statute reasonably and with legal justification and propriety can be applied to petit jury venires, but it is impossible to apply this statute as this statute is written to a grand jury venire or array.

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14.

Petitioner avers that the Grand Jury in Louisiana serves for six (6) months, from the first Monday (Tuesday) of September to the first Monday of March, and from the first Monday of March to the first Monday (Tuesday) of September; that the crime for which petitioner was indicted allegedly occurred on February 10, 1953, so that the term of the Grand Jury which indicted petitioner was approximately five months expired before the crime was committed.

565 SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

No. 226 Misc.

JOHN MICHEL, PETITIONER

vs.

STATE OF LOUISIANA

On petition for writ of Certiorari to the Supreme Court of the State of Louisiana.

ORDER ALLOWING CERTIORARI—February 7, 1955

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby granted and the case is transferred to the appellate docket as No. 579.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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